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# THE CHINESE AIRCRAFT IN HONG KONG

THE story of the Chinese aircraft in Hong Kong is worth careful consideration by lawyers because it involves an unusual number of questions of international law, most of them points which fell to be litigated in the courts of Hong Kong, though others called for consideration by His Majesty's Government only. Thus there arose the question of State immunity in regard to property in the possession or control of a State by reason of its being physically held by individuals ready to act under the orders of the State in question.[1] Then, because under the jurisprudence of our courts only the fact of possession and control has to be established and the legitimacy of the possession is not considered,[2] there also arose the question of the possible conflict with the obligation of international law (as interpreted by the English courts) to grant immunity in respect of property in the possession of the State with another principle of international law, namely, that a State must ensure protection for the property of aliens situated within its jurisdiction, and in particular not allow the aliens to be deprived of their property by individuals without providing an effective remedy in its courts.[3] There further arose the question of the rights and

[1] *The Christina* [1938] A.C., Lord Atkin, at p. 490 : ' The second [proposition of international law engrafted into our domestic law] is that they (the courts) will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or in his possession or control '.

[2] *Vide* Lord Wright in the case of *The Christina* [1938] A.C. at p. 506: ' It is unnecessary to consider by what mode the respondent (the National Government of Spain) obtained possession '. And at p. 509: ' This gives the sovereign, so far as concerns our courts of law, an immunity in respect of conduct in breach of the municipal law '.

[3] In other words, supposing a foreign State has (to take an extreme case) stolen the property of an alien of another nationality when that property is in British territory, must all the British authorities, judicial and otherwise, stand by and

duties of a State party to the Chicago International Civil Aviation Convention (Cmd. No. 6614 of 1945), when foreign aircraft are on its territory, and such aircraft may fly away in circumstances where it is disputed whether the aircraft have the proper national registration and other documents provided for by the Convention (see Articles 16, 17, 18, 19, 20) because nationality depends on registration, registration is based on ownership, ownership is in dispute and, though the aircraft can only be validly registered in one country, it is in fact apparently registered simultaneously in two countries because of the dispute about ownership. Again the case invites consideration of the question whether the State-owned or State-possessed aircraft, which engage in civil aviation, are or are not removed from the category of State property in respect of which immunity can be claimed because the Chicago Convention (Article 3) defines State aircraft in terms which do not cover any aircraft engaged in commercial civil aviation, whether State-owned or not, but confines the term to military, customs and police aircraft. Further, the story involves questions of the effect of recognition of governments in a case where a country is rent by a civil war, and His Majesty's Government's de jure recognition passes from one contending Government to the other in the middle of the story, thus raising the questions of the retrospective effect of de jure recognition, and of the effect of the recognition, as the de facto Government of the areas which it from time to time controls, of the Government which at the time is not recognised as the de jure (or even de facto) Government of the country as a whole. Finally, the story shows His Majesty's Government endeavouring to apply the rule of law in a most perplexing situation and when, quite naturally, it is subject to pressure from opposite sides in a matter of some, but not first rate, political importance. It was natural that the United States Government on the one hand should have felt that His Majesty's Government should be influenced by those considerations which would lead to the aircraft being permitted to fly to Formosa and that the Peking Chinese Government should feel equally strongly that His Majesty's Government's action should have been based on those considerations which would have produced the result of the aircraft being free to fly to Communist China. In the event, at the time of writing, the aircraft are still detained at Hong Kong on the basis that the question of ownership

let the foreign State remove the proceeds of its larceny? It is not suggested that there was larceny in the case of these aircraft, but nevertheless (as will be seen hereafter) the possible conflict between these two international obligations did arise.

must be determined by the courts, because a special Order in Council provides that State immunity is not to operate as a bar to such a decision being given, this Order in Council being an unprecedented step taken in circumstances for which it is believed there is no precedent.

2. The story, told chronologically, is as follows. Very early in 1949 two Chinese organisations operating civil air services were permitted by the Government of Hong Kong to make their main base at Kai Tak airfield, which is on the mainland in the Chinese territory leased to His Majesty's Government and administered as part of the colony of Hong Kong. As a result, some seventy aircraft belonging to these organisations were grounded on the airfield where they have been ever since, and a fairly large Chinese maintenance staff came with them, as well as a staff of managers, directors, etc. Kai Tak airfield, being an extremely busy one, and insufficient for the traffic and other demands upon it, the presence of these aircraft has at all times been a nuisance to the Government of Hong Kong which, from its own point of view, would have been glad to see them depart to almost any destination.

3. The aircraft belonged, as to approximately half, to an organisation which may be referred to as C.N.A.C., and, as to the other half, to an organisation which may be referred to as C.A.T.C. There is, however, a difference (of perhaps more importance to the strictly legal issues than has been generally appreciated) between the two organisations. C.A.T.C. was a department of the Government of China, was never incorporated as a company and perhaps resembles the United States Shipping Board of the period following the First World War.[4] C.N.A.C., on the other hand, was incorporated in China in July, 1945, as a company, eighty per cent. of its shares being owned by the Chinese Government and twenty per cent. by Pan-American Airways. Its seat and place of management was at Shanghai and its aircraft were based there. The aircraft of C.A.T.C. were based at Shanghai too. C.A.T.C., therefore, as an organisation would have been entitled to claim immunity under our law but C.N.A.C. would not, even if, like B.O.A.C., all the shares had been State-owned and the company entirely Government-controlled.[5] The aircraft of both organisations were largely operated by American personnel provided by Pan-American Airways. The incorporation of C.N.A.C. followed an agreement of December, 1945,

[4] *Vide Compagnia Mercantil Argentina* v. *United States Shipping Board*, 40 T.L.R. 601.

[5] *Vide* Lord Maugham in *The Christina*, *loc. cit.*, p. 520: 'No court has yet held that a foreign government can object to an action against a company in which it owns a number of shares'.

between the Chinese Government and the Pan-American Airways and in fact both organisations resulted from American assistance in the development of China under the Nationalists. The organisations moved to Hong Kong because of the southern advance of the Chinese Communist armies which threatened Shanghai, which had been the base of both organisations and also the place of the headquarters of the C.N.A.C. company.

4. Until the late autumn of 1949 the managers of the two organisations and the maintenance personnel apparently remained loyal to the Chinese Nationalist Government, whose servants, directly or indirectly, they were. But in early November two managers suddenly went over to the Chinese Communist Government, taking eleven C.N.A.C. aircraft with them and at the same time the majority of the Chinese maintenance personnel, in whose actual custody the remaining aircraft all were, changed their allegiance and were thenceforward ready to accept the orders of the Chinese Communist Government. There was thus a situation which has some parallels in the Spanish Civil War in connection with Spanish ships.

5. The Chinese Nationalist Government and the American interests realised that, unless they took some action, they would lose the aircraft. Consequently the Government cancelled or suspended the registration certificates and other documents required under the Chicago Convention, which meant that, unless and until other valid documents were issued, the aircraft were unable to fly under the Hong Kong regulations enacted in accordance with the Chicago Convention. The aircraft remained, however, in the physical custody of the employees who had gone over to the Chinese Communist side. So on November 24 two actions were instituted in the Hong Kong courts in the name of C.N.A.C. and C.A.T.C. by the Chinese Nationalists, in which interim injunctions were obtained ex parte against named employees restraining them from dealing or disposing of the aircraft, and on the very next day the defendants to these injunctions obtained ex parte counter injunctions in similar terms against the plaintiffs and so the aircraft were then frozen.

6. Then, on December 12, a contract was concluded between the Chinese Nationalist Government and two American citizens, Chennault and Willauer, under which Chennault and Willauer purchased, for 2,000,000 and 1,500,000 dollars respectively, all the assets of C.N.A.C. and C.A.T.C. Of course, so far as the C.N.A.C. assets were concerned, there was a complication that, in law, no Chinese Government were the legal owners of these assets and

therefore entitled to sell them—only the company could do that—but it was alleged that this contract was later ratified on December 31, 1950, at a meeting in Hong Kong of the Board of Directors of C.N.A.C. There was some question, however, whether or not a legal contract had been concluded which complied with the articles of association of C.N.A.C., even on the assumption that only Chinese Nationalist law had to be taken into consideration. This complication did not arise with regard to the C.A.T.C. assets. Then, on December 17, Chennault and Willauer sold their interest to a company newly incorporated in the State of Delaware, U.S.A., called C.A.T.Inc., and it was thenceforward the position of the Chinese Nationalists and the American interests that this United States company C.A.T.Inc. were the legal owners of all the aircraft, and in due course American documents for registration of the planes, etc., were issued.

7. However, the Chinese Communist side were also active. The Chinese People's Government had been paying the wages of the staff who actually had the custody of the planes since November 15. It also appointed new managing and other directors and managers for C.A.T.C. and C.N.A.C. These new C.N.A.C. directors purported to maintain the headquarters of the company at Shanghai until they moved it to Tientsin on January 10, 1950. The Chinese People's Government also declared C.N.A.C. to be the property of the Chinese Communist Government and directed a new general manager to take over the assets in Hong Kong. The Chinese Communist Government also claimed the ownership of the C.A.T.C. aircraft on the simple ground that they were State property and it was the Government of China. In due course the Chinese Communist Government issued registrations and other documents in respect of the aircraft.

8. The sale by the Chinese Nationalists of the aircraft to C. and W. and the subsequent sale by C. and W. to C.A.T.Inc. referred to in paragraph 6 above, naturally rendered it necessary for the Chinese Nationalists and American interests to reconsider their position with regard to the legal proceedings in the Hong Kong courts. As indicated in paragraph 5, they had obtained in the name of C.N.A.C. and C.A.T.C. an interim injunction freezing the aircraft at Hong Kong but now, on their own case, C.N.A.C. and C.A.T.C. had no interest in the aircraft at all. The first step was taken by this side about December 22, and was an application to join C. and W. as additional plaintiffs to C.N.A.C. and C.A.T.C. in the action which the interim injunctions had been granted. This application failed on the ground

that the interests of C. and W. conflicted with those of C.N.A.C. and C.A.T.C. Moreover, C. and W. had themselves sold to C.A.T.Inc. and had no longer a legal interest. At the same time the defendants to these injunctions, *i.e.*, the employees in whose custody the aircraft actually were, applied to have the injunctions removed and this application also failed for the reason that it depended on grounds of fact and law which could only be decided in the action, and both parties then agreed to the indefinite continuance of the injunctions.

9. At midnight on January 5/6, 1950, His Majesty's Government ceased to recognise the Chinese Nationalist Government as the de jure Government of China and recognised the Chinese People's Government as being the de jure Government of that country. This produced the result that the Chinese People's Government became from the point of view of the law of the U.K. and Hong Kong entitled to hold the assets situated in British territory of the Chinese State and Government, *i.e.*, if these assets had not been validly disposed of (*Haile Selassie* v. *Cable and Wireless*, 54 T.L.R. 1087, and 55 T.L.R. 200).

10. On January 6, 1950, two new cases were instituted by the Chinese Nationalists and American interests. The first of these cases was brought by C.A.T.Inc. against C. and W. claiming the possession of the assets of C.N.A.C. and the second action was the same except that it was a claim to the assets of C.A.T.C. After the issue of the writ the plaintiff C.A.T.Inc. applied to the court for the appointment of a receiver to take possession of the assets of C.N.A.C., the function of the receiver being to hold the assets in safe custody until the court had decided to whom they belonged. This last application was rejected on January 9 on the ground that the plaintiff had failed to support it by sufficient evidence of its title to the property. Then, on January 21, C. and W., the nominal defendants to the two last-named actions, applied for and obtained leave to serve a third party notice on the named employees who had the custody of the aircraft and were the defendants to the first injunction. The affidavits of the third parties at once disclosed that the application for a receiver was going to be opposed on the ground that the aircraft were in the possession and control of a foreign sovereign Government. These two last cases, with the application for the receiver, were heard at long hearings which took place between February 1 and 9 before the then Chief Justice of Hong Kong, Sir Leslie Gibson, and he reserved judgment.

11. Before he delivered judgment the Chief Justice was in possession of the answers of His Majesty's Government to certain

questions which he had formulated. It is only necessary to quote the answers, which were as follows :—

' (1) His Majesty's Government in the United Kingdom does not recognise Nationalist Government (Republic Government) as de jure Government of Republic of China.

(2) Up to and including midnight, January 5/6, 1950, His Majesty's Government recognised Nationalist Government as being de jure Government of Republic of China and as from midnight, January 5/6, 1950, His Majesty's Government ceased to recognise former Nationalist Government as being de jure Government of Republic of China.

(3) As from midnight of January 5/6, 1950, His Majesty's Government recognised Central People's Government as de jure Government of Republic of China.

(4) His Majesty's Government recognise that the Nationalist Government has ceased to be de facto Government of Republic of China. It ceased to be de facto Government of different parts of the territories of Republic of China as from the dates on which it ceased to be in effective control of those parts.

(5) His Majesty's Government does not recognise any governments other than Central People's Government of People's Republic of China as de facto Government of Republic of China. Attention, however, is invited to the second sentence in answer to question (4).[6]

I am advised that the effect of recognition by His Majesty's Government as stated in answer to questions (1) to (5) and in particular its retroactive effect, if any, are questions for court to decide in the light of those answers and of evidence before it.'

12. On February 23, Gibson C.J. delivered judgment on the cases referred to in paragraph 10. He dismissed the application for a receiver on the ground that the aircraft were in the de facto possession and control of the Chinese People's Government which

[6] There was also an answer relating to Formosa which reads as follows, but it played no part in the decision: (6) In 1943 Formosa was a part of the territories of Japanese Empire and His Majesty's Government consider Formosa is still de jure part of that territory. On December 1, 1943, at Cairo, President Roosevelt, Generalissimo Chiang Kai-shek and Prime Minister Churchill declared all territories that Japan had stolen from Chinese including Formosa should be restored to Republic of China. On July 26, 1945, at Potsdam, the heads of the Governments of United States of America, the United Kingdom and Republic of China reaffirmed ' The terms of Cairo Declaration shall be carried out '. On October 25, 1945, as a result of an order issued on the basis of consultation and agreement between Allied powers concerned Japanese forces in Formosa surrendered to Chiang Kai-shek. Thereupon with the consent of the Allied Power Administration, Formosa was undertaken by the Government of Republic of China. At present, actual administration of the island is by Wu Kuo Cheng, who has not, so far as His Majesty's Government are aware, repudiated superior authority of Nationalist Government.

had been recognised by H.M.G. as the de jure Government of China. He delivered a full and carefully worded judgment in the C.N.A.C. action and a brief one in the C.A.T.C. action. The judgment was based on the case of *The Christina* (see footnote, paragraph 1 above). Dealing with the C.N.A.C. aircraft, he said, after reciting the facts: (1) that it was not necessary for the foreign sovereign to come before the courts to claim immunity: it was for the courts to take notice of the claim if there is no submission to the jurisdiction and the issue is raised: (2) the question whether an entity is to be regarded as a de jure or de facto government is a question on which the court has to be guided by the attitude of His Majesty's Government, and he referred to Lord Atkin in *The Arantzazu Mendi* [1939] A.C. at p. 264, where Lord Atkin says: 'One State cannot speak with two voices on such a matter, the judiciary saying one thing and the executive another': (3) he then quoted the answers of His Majesty's Government to his questions: (4) he rejected the claim to immunity on the ground that the aircraft were in the ownership of the Chinese People's Government because ownership must be proved and the evidence before him had not proved that the ownership of the aircraft was vested in the Chinese People's Government. There was no proper evidence of Chinese Communist law and in any case, even if there had been proper evidence of a Chinese Communist decree transferring property from C.N.A.C. to the Government, it was questionable whether that decree would be operative in Hong Kong: (5) he accepted the claim to immunity based on possession after carefully pointing out that it was necessary to show that the planes were in the possession of the Chinese People's Government rather than of C.N.A.C. because C.N.A.C. enjoyed no immunity, even if the Government owned all the shares and completely controlled it. In other words, it must be shown that the Government were in control or possession to the exclusion of the C.N.A.C. company. To quote his words:

> 'Where there is actual possession, the questions of legality are the very questions in regard to which the law gives the foreign sovereign immunity. I make this point because the directive from the Premier of the Chinese People's Government of November 12, 1949, and further directives from the Head of the Civil Aviation Bureau of January 13, 1950, are not proved to be valid as requisitions under any law of China and would certainly not affect the possession of the assets in Hong Kong under the municipal law of the colony. The importance of a purported requisition by a foreign government seems to me to lie in the indication it gives that the foreign

government intends to have possession. Without such an indication, the mere declaration by persons, who have the custody, that they held them for a foreign government would not be enough to establish possession in the foreign government. But a purported requisition under a foreign government is clearly not the only way in which the indication can be given and it is suggested that such an indication is to be gathered from the directives above mentioned and the fact that the Chinese People's Government is paying the wages of the persons here who have the custody of the assets. I am asked to infer that the high officers who have given the directives have done so on behalf of the Chinese People's Government. It may be noted that the political situation has made it impossible for the corporation to have any proper directors' meetings and that the injunctions in the previous action are regarded as preventing the corporation from itself paying the wages. There may well be other reasons for the action of the Chinese People's Government but with the reasons I am not in my opinion concerned, except in so far as they make it more probable or less probable that the Chinese People's Government intended to take possession. *The question of whether such an intention is established has given me considerable difficulty because, although the directives seem to be clear enough, there are certainly passages in the affidavits which suggest that the Chinese People's Government is to exercise control merely through its alleged shareholding and that the persons having custody of the assets here remain employees of the corporation and not of the Government. On the whole I think that the intention is established. It is consistent with this view that the Government intend to act as far as possible through the machinery of the corporation.*'

It is perhaps on this last question of fact on which the Chief Justice felt considerable doubt that his judgment might have been most open to attack, and it might have been held that possession was vested in the C.N.A.C. company, but it does not seem that before the Court of Appeal later the plaintiff C.A.T.Inc. raised the point particularly. Considering the position on the hypothesis that he was wrong on the issue of possession, Gibson C.J. said that in that event the aircraft were clearly in the possession of the C.N.A.C. company, and he then gave two reasons why he would still have felt obliged to reject the present application for a receiver. First, that in this case the proper parties were not before the court, seeing that the C.N.A.C.

company was not a party to the present proceedings. Secondly, he stated that it was a matter of discretion for the court whether an application for a receiver is to be granted and the court should not appoint one in circumstances, when so doing might inflict an injury on another party, unless at any rate a good prima facie case for title had been made by the party applying for the receivership and he was not satisfied on the evidence before him that the C.A.T.Inc. had made such a case. In a word, C.A.T.Inc.'s title all depended on whether the C.N.A.C. corporation had as a matter of law been divested of its property in the planes and he doubted whether the C.N.A.C. corporation had ever adopted the contract of sale and divested itself of its ownership in a manner which would be required according to the articles of that company. In expressing this view, Gibson C.J. did not find it necessary to go further than consider the question on the footing most favourable to the plaintiffs that only the law of Nationalist China was applicable, and he did not consider the changes in the Board of Directors made by the Chinese People's Government.

13. The judgment in the C.A.T.C. action is very brief and the essence of it can be quoted :—

> 'There is only one important difference, namely, that whereas C.N.A.C. is a corporation incorporated under the laws of China, it is agreed by counsel that C.A.T.C. has never in fact been incorporated but is a department of the Government of China. *The result of this difference is to give the question of ownership of the assets in Hong Kong a new complexion* but I find it unnecessary to deal with the question of ownership on this interlocutory application since in this case there can, in my opinion, be no doubt that the present Government of China is in possession of the assets here in circumstances which give rise to sovereign immunity.'

By way of comment the present writer would only add that in his view there was little doubt that immunity could be claimed in the case of the C.A.T.C. aircraft, subject to one point referred to in paragraph 18 below which was never argued in either case. Further, as the Chief Justice pointed out, the question of ownership in the case of the C.A.T.C. aircraft turns on different considerations from those involved in the question of ownership of the C.N.A.C. aircraft and, indeed, it seems quite possible that the question of ownership might be decided one way in the case of the C.N.A.C. aircraft and in another way in connection with those of C.A.T.C.

14. On the same day that Gibson C.J. delivered the above-mentioned judgment, the two injunctions referred to in paragraph 5 were removed on the application of the employees who had the custody of the aircraft. Naturally the Chinese People's Government side had no longer any reason to desire the continuation of the injunctions and the application for their removal was not opposed by the other side, partly, it would appear, because the injunctions had been obtained in the name of C.N.A.C. and C.A.T.C. and according to the case of the Chinese Nationalist side these entities had no longer any interest in the aircraft. It is strange, however, that C.A.T.Inc. did not apply for leave to oppose the removal of the injunctions pending its appeal on the issue of immunity. It did at a later stage apply unsuccessfully for a new injunction.

C.A.T.Inc., the plaintiffs in the application for a receiver, appealed from the judgment of Chief Justice Gibson to the Court of Appeal of Hong Kong. Judgment in this appeal was not delivered till May 13 and, though in the interval certain most important things happened and the Court of Appeal's judgment was of little practical interest at the moment it was given, it may be convenient to consider it here before dealing with these other matters.

15. The Court of Appeal (consisting of the acting Chief Justice and two puisne judges) appear from the text of the judgment to have been in possession of a further answer by His Majesty's Government on the question of recognition, namely, that 'His Majesty's Government recognise that the Central People's Government was the de facto government of those parts of China which it controlled between October 1, 1949, and January 4, 1950, the date of its de jure recognition'. At any rate, though it does not say this in terms, the terms of the judgment certainly imply either that the court was in possession of such a further answer or that it had been deduced as the obvious corollary of the last sentence in paragraph 4 of the answers quoted in paragraph 11 above. The Court of Appeal judgment gives more information in regard to the steps taken in Communist China with regard to C.A.T.C. The relevance of this information for present purposes is that the Chinese People's Government also stated that C.A.T.C. was merely a department of the Chinese Government and to explain the steps which the Communist Government had taken with regard to the appointment of directors and controllers of C.A.T.C. and to obtain possession of its assets.

The first point dealt with in the Court of Appeal judgment is the argument that the aircraft should not have immunity on the

ground that they were not public property 'dedicated to the public use' within the meaning of an expression in *The Parlement Belge*. It is, of course, well known that two of the Law Lords in *The Christina*, Lords Maugham and Macmillan, were of the opinion that immunity should not be granted to vessels or property employed in trade. The Court of Appeal rejected this argument of the appellants (1) on the basis of *The Porto Alexandre* [1920] P. 30, *viz.*, which held that even Government ships engaged in trade have immunity, and (2) on the ground that in any case these aircraft were destined to the public use because they provided air services of national importance and carriage of mails. On the latter point the writer would only add three comments:—

(i) If 'dedicated to the public use' has as wide a meaning as this, it is likely to cover all property used by a Government for almost any purpose which a Government is likely to use it. Indeed, Gibson C.J., in first instance, made remarks indicating a somewhat similar view.

(ii) The distinction sometimes referred to in England between property dedicated to public use and property employed in trade is not at all the same as the distinction drawn in the jurisprudence of some continental countries between governmental activities jure imperii and jure gestionis.

(iii) As regards aircraft engaged in civil aviation, there was an argument against immunity based on the Air Navigation Convention which was never taken (*vide* paragraph 18, below).

16. The second point of interest dealt with by the Court of Appeal was an argument that the writ in this action was issued on January 5 and the recognition of the Chinese People's Government as the de jure Government of China only took place at midnight on the 5th/6th, *i.e.*, some hours after the writ was issued, and therefore the Chinese People's Government could not claim immunity from this proceeding. This argument is rejected by the Court of Appeal on two grounds:—

(a) That the Chinese People's Government, being recognised as the de facto Government of large areas of China prior to the issue of the writ, was entitled to the benefit of the doctrine of immunity even as a de facto Government, and reference is made to *The Arantzazu Mendi*, where the immunity of the then de facto Franco Government of Spain was recognised.

(b) In any case the relevant date for determining whether immunity should be recognised is not the date of the issue of the writ but the date when immunity is claimed (*Christina*, *l.c.*, p. 506) and the question turns on whether the Government had possession at that time. Immunity in these proceedings was

claimed after January 6, when the third party notice was served on the employees.

17. The third point was the argument by the appellants that (1) the Government recognised de jure is entitled to assume the assets of the State situated abroad to the exclusion of any Government recognised de facto (*Haile Selassie* v. *Cable and Wireless, Ltd.* [1939] Ch. 183): (2) when a new Government is recognised de jure it has to accept as binding on itself valid contracts made by its predecessor as de jure Government in territory not at the time under the control of the Government now recognised de jure and relating to property there (*Boguslawski* v. *Gdynia-Amerika Linie* [1950] 1 K.B. 157): (3) and the aircraft in question were all in Hong Kong and had been sold on December 12 by the then de jure Government before the Chinese People's Government was recognised de jure. Now, this third argument was one directed against the subsidiary point made by Gibson C.J. in his judgment in the C.N.A.C. action, that he was not satisfied that the plaintiffs in this action had made a sufficient prima facie case of title to justify him in granting their application to appoint a receiver (see end of paragraph 12, above). The argument does not touch on the question of immunity. Now, Gibson C.J. only made this observation in the C.N.A.C. action and in the C.A.T.C. action he said the question of ownership depended on different considerations. The Court of Appeal rejected this argument on *two grounds*, one of which applies to C.N.A.C. only and the other applies to both C.N.A.C. and C.A.T.C. The ground applying to C.N.A.C. only was based on the case of *The Banco de Bilbao* v. *Sancha* [1938] 2 K.B. 176, namely that C.N.A.C. was a company domiciled at Shanghai, at the relevant time Shanghai was under the control of the C.P. Government and therefore the law of Communist China and the acts of the C.P. Government in appointing directors, etc., for C.N.A.C. should be regarded as applicable to the C.N.A.C. property rather than those of Nationalist China. Therefore nothing that Nationalist China's directors did with regard to these aircraft, and the purported sale of the property depended on these Nationalist directors, could be regarded as valid. The ground for rejecting the argument seems to the present writer to be a strong one. The other ground which applies to C.A.T.C. as well is based on the doctrine that, when a Government is recognised de jure, its right of succession is to be dated back at any rate to the date when de facto recognition took place (see the Master of the Rolls in the *Haile Selassie Case* [1939] Ch. 197). The comment of the present writer on this last point, however, is that he considers that the

Court of Appeal probably erred in holding that the retroactive effect of recognition could have the effect of nullifying the actions of the previous de jure Government when these actions were taken with regard to property which at the time the actions were done was situated within the territory controlled by the old de jure Government or in the territory of a third country, and that he thinks that this principle really emerges from the Court of Appeal judgment in *Boguslawski* v. *Gdynia-Amerika Linie* [1950] 2 All E.R. 355.[7] Not only were the C.A.T.C. aircraft at Hong Kong but C.A.T.C. was not a company at all but a department of the Chinese Government and the Chinese National Government *were* (from the point of view of the law of Hong Kong) THE de jure Chinese Government in December, 1949. It would seem, so far as the C.A.T.C. aircraft are concerned, that there is prima facie good reason to suppose that the Chinese Nationalist Government in December, 1949, were in a legal position to, and in fact did, transfer the property of these aircraft to C. and W. At any rate, it would appear at first sight as if, on the question of ownership, the C.A.T.Inc. has a far stronger case with regard to the C.A.T.C. aircraft than with regard to the C.N.A.C. aircraft.[8]

18. It seems to the present writer that there was one argument against the immunity of these aircraft which might have been made by the plaintiff C.A.T.Inc. which was never put to the court at all. This argument is that the effect of the Chicago Civil Aviation Convention is that State aircraft engaged in civil aviation are not to enjoy immunity. The argument would be based (i) on Article 3 (*a*) and (*b*) of the Convention, which read as follows:—

> '(*a*) This Convention shall be applicable only to civil aircraft and shall not be applicable to State aircraft.
>
> (*b*) Aircraft used in military, custom and police services shall be deemed to be State aircraft.'

and (ii) on the provisions of the Convention generally which show that all civil aircraft except State aircraft as covered by the definition in Article 3 (b) are to be subject to the law of the territories

[7] See the excellent note on this case in the *International Law Quarterly*, October, 1950, at p. 564, by Mr. Carter.

[8] The doctrine of the retroactivity of a recognition has been much discussed. It does, however, occur to the present writer that its scope is much reduced, if the court is able (either on the basis of statements from its Government as is the practice in the U.K., or on the basis that it is entitled to do this *proprio motu* as seems to be the practice to some extent in the U.S.A.) to treat a Government which in fact controls a territory as a de facto Government, to whose laws and Acts legal effect must be given when performed within the area which it in fact controls, even if it is not recognised or before it is recognised de jure. It is failure to realise the effect of de facto recognition which seems to be largely responsible for most of the difficulties which have arisen in connection with the doctrine of retroactivity of recognition.

over which they fly or on which they land, and certainly are to be subject to executive action by the authorities of a foreign territory. Thus, for instance, Article 11 says :—

> ' The laws and regulations of a Contracting State relating to the admission to and departure from its territory of aircraft engaged in international air navigation or to the operation and navigation of such aircraft within its territory shall be applied to the aircraft of all Contracting States without distinction as to nationality, and shall be complied with and by such aircraft on entering or departing from or while within the territory of that State '.

It seems to be clear, for instance, that executive authorities in Hong Kong would have had the power and perhaps the duty to stop Chinese State-owned aircraft engaged in civil aviation from flying if these aircraft did not comply with the Hong Kong regulations. Of course, it may not follow from this that it was the intention of the Convention that the aircraft should be subject to the jurisdiction of the courts and should be detained by court injunction when there is a dispute as to ownership and possession. Nevertheless there is an argument here which in fact is to some extent reinforced by draft conventions being prepared under the auspices of I.C.A.O. which clearly indicate that even State-owned aircraft engaged in civil aviation will be subject to the jurisdiction of foreign courts.

19. It is now necessary to return to the position described in paragraph 14 above which prevailed immediately after the Chief Justice of Hong Kong gave his judgment upholding immunity and the injunctions were taken off. There was thus a position where the aircraft were free to fly away to China, provided that the Governor of Hong Kong did not think it necessary to detain them because they failed to comply with the civil aviation regulations of Hong Kong which, as indicated in the preceding paragraph, the Governor had the right and perhaps the duty to do if these regulations were not being observed. The position was that, under these regulations, these aircraft should have a proper certificate of registration and certain other documents which had to be furnished by the authorities of the country in which they were registered. There were, however, in existence in respect of the aircraft two sets of documents, one issued by the authorities of the C.P. Government of China and the other by the authorities of the United States of America, and the question which were the correct documents for the aircraft to carry depended on the ownership of the aircraft, a point which had never been decided in the courts because immunity had been upheld. The Chicago Convention, Article 18, provides

that an aircraft cannot be validly registered simultaneously in more than one State. It could be argued that if the Governor allowed the aircraft to fly away on the Chinese documents he was in effect holding that the Chinese documents were the right documents and his decision on this point was equivalent in its effect to a decision by the Hong Kong courts declaring that the ownership of the aircraft was Chinese. It could, of course, be argued on the other side that his power to stop aircraft from flying, because they had not got the right registration and other documents, was a discretionary power and that he would be doing nothing wrong in letting the aircraft fly away on Chinese documents because the aircraft had come in upon Chinese documents, though of course the original Chinese documents were issued by the Nationalist Government of China and not the C.P. Government. There was, however, a further point. The Government of the United Kingdom has certainly a duty under international law to protect foreign property in its territory and that duty may well be held to involve an obligation to provide a remedy for A if he alleges that B has wrongfully obtained possession of A's property and is going to remove it from the jurisdiction. Therefore it could be said that, if the authorities in Hong Kong allowed the aircraft to fly away, when the question of ownership was not determined, there was a failure on the part of the United Kingdom to comply with an obligation resulting from the international duty to protect foreign property, since C.A.T.Inc. was maintaining that the aircraft belonged to them and that the authorities of the C.P. Government had obtained possession of them wrongfully, and there had been no remedy in the Hong Kong courts because the courts held they had no jurisdiction because of the immunity of the alleged wrongdoer. On the other hand, it can be argued that there is also an obligation under international law to recognise the immunity from the jurisdiction of foreign sovereigns and their property. It could be said, therefore, that there was a conflict of international obligations and it was a question in the case of this conflict which obligation should prevail. It may be material in this connection that perhaps the English rule which gives immunity to property which is in the de facto possession and control of a foreign Government, whether that possession has been obtained legally or not, may go beyond the obligations of international law with regard to the immunity of foreign sovereigns as interpreted in the courts of a number of countries.

20. It would appear that H.M.G. were in something of a quandary with regard to these aircraft, there being forcible arguments which could be put forward both on the Chinese Nationalist

American side and on the Chinese Communist side. However, it is clear from the interesting, and it is believed unprecedented, action which H.M.G. took that H.M.G. felt that the obligation to protect foreign property in their jurisdiction overrode in the circumstances of the case the other obligation, because what in fact H.M.G. did was to enact an Order in Council which gave the courts of Hong Kong jurisdiction to determine the ownership of the aircraft notwithstanding any claims which might be made to State immunity, and providing that the aircraft should be detained till ownership was decided. The Order in Council is dated May 10, 1950, and is of sufficient general interest to justify the reproduction of the greater portion of it in an annex to the present note. Particular attention is invited to the Preamble and Article 1 (1), of which the explanation or apparent justification has already been given in paragraph 19 above. The other provisions which are of interest are Article 1 (2) and Article 2, whose purpose is to prevent the court from holding itself unable to determine the ownership of the aircraft either because no interested party puts in a claim to be adjudged the owner of the aircraft, or because one party having done so, the other party does not choose to contest the claim. The court is to go into the matter and determine the ownership even if no party appears before it if the Governor publishes an Order to that effect and, if one party appears only, then the court is not merely to give judgment by default but it is to inquire into the matter fully before giving judgment. In other words, the courts of Hong Kong are to determine the ownership of the aircraft after a full investigation of the matter and the purpose of the Order in Council is to ensure that this question of ownership should be decided. Though the court would naturally be greatly assisted if both parties appeared and argued fully on the question of ownership, nevertheless in the particular circumstances of the case the court should not have great difficulty in determining ownership even if not in possession of full arguments and further evidence from either side. There had been a good deal of evidence and a good deal of argument in the proceedings which took place with regard to immunity, and in so far as the court wanted further evidence as regards other facts, the nature of the evidence required is such that it would appear that the courts should not have great difficulty in obtaining it with the help of, for instance, the Attorney-General of Hong Kong. The Order also provides for appeals to the Full Court of Hong Kong and the Privy Council, which seems right, as clearly the question is an important one both from the point of view of the value of the property involved and the questions of law involved.

21. In the event, C.A.T.Inc. interests put in a claim to the aircraft and the C.P. Government and the authorities controlled by it have so far declined to take any part in the proceedings. The subsequent procedure has not been rapid but it is believed that there will be a hearing of the claim of C.A.T.Inc. before very long. As Chief Justice Gibson clearly felt in his brief judgment as regards the C.A.T.C. aircraft, the question of ownership in the case of C.A.T.C. depends on completely different considerations from the question of the ownership of the C.N.A.C. aircraft just because C.N.A.C. was a company and C.A.T.C. merely a department of the Chinese Government. To the present writer it appears that C.A.T. Inc. can make a better legal case for the C.A.T.C. aircraft than for the C.N.A.C. aircraft.

## ANNEX

### Order in Council of May 10, 1950, Articles 1–3

Whereas evidence has been produced to the Governor of Hong Kong that seventy aircraft now on the Government airfield at Kai Tak in Hong Kong are registered both in the United States of America and in China and, the aircraft not being State aircraft within the meaning of the Chicago Convention on International Civil Aviation, 1944, such dual registration is contrary to Article 18 of that Convention:

And Whereas the ownership of the aircraft is in dispute and there are conflicting claims to their possession :

And Whereas it is just and desirable that the question of the ownership of the aircraft and of the right to their possession should be decided by a court of law before they are permitted to leave Hong Kong :

Now, therefore, His Majesty, in exercise of all the powers enabling Him in this behalf, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows :

1.—(1) In any action or other proceeding concerning the aircraft which may be instituted in the Supreme Court of Hong Kong after the date of the coming into operation of this Order, it shall not be a bar to the jurisdiction of the Court that the action or other proceeding impleads a foreign Sovereign State.

(2) If a defendant in any such action or other proceeding fails to appear, or to put in a defence, or to take any other step in the action or other proceeding which he ought properly to take, the Court shall, notwithstanding any rule enabling it to give judgment

in default in such a case, enquire into the matter fully before giving judgment.

2.—(1) If at any time after twenty-one days from the date of the coming into operation of this Order the Governor is satisfied that no action or other proceeding is pending to which sub-section (1) of section one of this Order applies, and in which, or as a result of which, the ownership of the aircraft or the right to possession thereof is likely to be finally determined, the Governor shall by order published in the Gazette refer the questions of the ownership of the aircraft and the right to the possession thereof to the Court for determination.

(2) On any such reference the Court shall enquire fully into and determine the questions notwithstanding that the reference may implead a foreign Sovereign State.

3. Any person claiming the ownership or right to possession of any of the aircraft and aggrieved by the decision of the Court in an action or other proceeding or reference may appeal therefrom to the Full Court and from thence to His Majesty in Council, and such an appeal shall lie notwithstanding that such person has not taken any part in the previous proceedings.

# UNIFICATION OF THE LAWS RESPECTING NEGOTIABLE INSTRUMENTS

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## I

It does not seem necessary to urge the desirability of appropriate uniformity in the laws concerning negotiable instruments, particularly those that have international circulation. This branch of law, which originated in the needs of international commerce, is a field in which anarchy is least conducive to business needs, and certainty, stability, and an approximation to similarity of the commercial laws is most essential. The problems, consequently, which are involved in unifying this subject-matter on an international basis, concern, not the advisability, but rather the scope of such an undertaking and especially the means to be employed in an effort to complete the substantial advances that have already been accomplished in the unification of the negotiable instruments laws of the world.

It is therefore pertinent in considering these problems, first, to survey the existing situation very briefly, second, to formulate the steps that need to be taken in the interests of effective unification, third, to consider the outstanding features of the two principal systems of negotiable instruments law, that of the Civil Law, as illustrated by the Geneva Uniform Law, and that of the Anglo-American law, fourth, to define with care the scope of such proposals of unification as may be projected, and, finally, by way of summary to outline an appropriate plan of action.

## II

For present purposes, reference to the first of these topics may be quite brief, as the existing contours of the laws of commercial paper, envisaged from an international point of view and disregarding theoretical disputes and many other minor differences of detail, are commonly known. The first and outstanding consideration is that extensive progress has been accomplished in the direction of unification. The English Bills of Exchange Act, originally enacted in 1882, has been adopted with singularly few variations and

exceptions throughout the British Commonwealth; it has also had influence in other countries, notably in the legislation of the United States, less conspicuously in that of a few others, such as Siam and Costa Rica. The related legislation of the United States, the Negotiable Instruments Act, first promulgated as a proposed uniform law by the National Conference of Commissioners on Uniform State laws in 1896 for enactment by the forty-eight States, has been adopted as a uniform law with insubstantial minor variations throughout the country, in Alaska, Hawaii, Puerto Rico, the Philippines, and other possessions, as well as in Panama and Colombia.

During the present century, in Continental Europe, great progress has likewise been made towards unification as a result of the efforts of The Hague Conferences of 1910 and 1912, and more recently of the Geneva Conferences of 1930 and 1931. The most important achievements of these conferences, the Uniform Law on Bills of Exchange and Promissory Notes, as annexed to the first Geneva Convention, has been adopted by the principal European countries (with the important exceptions of Great Britain and Spain) as well as by Japan, while the substantially similar Uniform Regulation as formulated at The Hague Conference of 1912 is in force in Yugoslavia, Turkey, Ecuador, Guatemala, Nicaragua, and Venezuela. In effect, the Uniform Law represents a substantial reconciliation of the Continental systems in a carefully prepared model.

Thus, the existing negotiable instruments laws fall into two major groups, representing a stage of what may be termed partial or parallel unification. The one group is represented by the Geneva Uniform Law; the other comprises the areas covered by the British Bills of Exchange Act and the United States Negotiable Instruments Law. Yet although these two enactments are similar in essentials, it is to be emphasised that they are not yet unified. Fundamentally, their arrangement is dissimilar, a difference of real practical significance, and there are certain variations of detail.

Even more important is the fact that these two uniform laws have proved very successful measures of unification for their respective spheres, with the consequence that proposals of amendment invariably meet with opposition for fear that uniformity achieved after much effort during many years will be compromised. Thus far, this has been a major impediment to unification, either of the British and the United States Acts with each other or, more definitely, with the Continental laws. For this reason, although

both Great Britain and the United States were represented at The Hague and Geneva Conferences, neither country has become a party to the various conventions respecting commercial instruments elaborated at these Conferences (except the two conventions of Geneva on stamp laws in connection with bills of exchange and promissory notes of 1930, and with cheques of 1931, respectively, which were signed and ratified by Great Britain). There is every reason to assume that this aloof attitude of Great Britain and the United States has been the principal obstacle to comprehensive international unification in this field.

On the other hand, to an outside observer, it would seem premature to regard the Geneva Uniform Law as a definitive synthesis of the existing laws, even of the Continental systems, as is at times claimed. Aside from the circumstance that Spain and all but four of the Latin-American countries have not yet adopted either the Uniform Regulation or the Uniform Law, there apparently remain basic conflicts. Important problems have been either excluded from the scope of the Uniform Law or perpetuated by the twenty-three reservations to the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes of 1930. Thus, the most thorny of these problems, the question of the relation between the bill and the transaction between drawer and drawee, *viz.*, that of cover, has simply been excluded. Article 16 of Annex II to the Convention states:

> 'The question whether the drawer is obliged to provide cover (*provision*) at maturity and whether the holder has special rights to this cover remains outside the scope of the Uniform Law.
>
> The same applies to any other question concerning the legal relations on the basis of which the bill was issued'.

Indeed, the fact that on numerous points of substance or procedure the Uniform Law is hedged in by reservations allowing special national variations, derogates measurably from its value as a comprehensive and definite basis for unification. It would be unjust to characterise so considerable a step in the desired direction as a 'legge difforme',[1] but it does invite re-examination, particularly since the solutions on certain points, such as the requirement of 'denomination' in bills of exchange and the exclusion of instruments to bearer (except in case of indorsement!), would undoubtedly serve to preclude its acceptance in Anglo-American jurisdictions.

[1] Thus, Ferrara, 'La legge difforme cambiaria' (1934) 32 Riv.Dir.Com. 513 *et seq.*

The conclusions to be drawn from the foregoing observations on the existing negotiable instruments laws are: first, that, as Ascarelli has pointed out,[2] the primary problem of international unification in this field is to harmonise the Anglo-American and the Continental systems, the latter as in general represented by the Uniform Law; second, that to make a practical advance in this direction a way must be opened especially by those interested in Great Britain and the United States to reconsider their respective laws in the interests of international unity; third, that from this viewpoint various solutions adopted in the Uniform Law of Geneva invite re-study. These considerations, in the writer's judgment, argue for substantial reconsideration of the basic problems.

## III

Considerations of the steps that may appropriately be taken in view of these conclusions assumes that, as stated, the laws on negotiable instruments have advanced to a stage of partial consolidation that encourages the hope of more general unification in the near future. The existing variations in the laws codifying this branch of the law merchant appear due more to the date of enactment than to disparities in local customs, and to connection with the varying civil and procedural laws in the background rather than to insuperable intrinsic differences in the negotiable instruments laws themselves.

But in the last analysis, it is for international-minded lawyers in collaboration with chambers of commerce and other organisations and individuals interested in the promotion of international trade, to claim for this problem the objective attention that it deserves. It cannot be too much emphasised that the active support of those most directly concerned is the indispensable and primary ingredient of effective effort towards legal reform. This is the first practical requirement.

This much promised, it is germane to refer to the direction that such effort should take. One thing is obvious: resolutions and other indications of interest are necessary but not in themselves enough. A definite proposal is required, and to make such a proposal intelligently a detailed survey of the existing institutions and needs is prerequisite.

At the present juncture, such a survey of the existing laws affording an adequate basis for comparison of the Anglo-American and Continental systems of negotiable instruments, is

[2] In his preface to P. J. da Silva Pinto, *Direito Cambiário*, Rio de Janeiro, 1948, at p. xvi.

basically needed. Without this, the extent to which particular national laws are generally representative or desirable, or perhaps are antiquated or defective, is not readily apparent, nor is it feasible to make persuasive arguments for the amendment of this provision or that to secure international uniformity. Indeed, without such a survey, it is scarcely possible for the jurists in one country to envisage the peculiar features of other legislations or to appreciate how these are to be reconciled in a proposed uniform law. In the United States and Great Britain, there is special need of such information in view of the limited attention hitherto given to comparative studies in this field.

On the basis of such a survey, it will become feasible to contemplate the second necessary step towards unification, *viz.*, the preparation of a comprehensively analysed and documented project of unification. This, like the comparative survey, can be most efficiently conducted under private auspices, but it should reflect wide recourse to criticism and suggestions from legal and commercial circles in at least the principal countries. The object at this stage should be to prepare, not an inflexible text but rather an adequately supported exposé of the bases on which unification can be achieved, with alternate suggested solutions for disputable issues, so as to provide the necessary groundwork for eventual consideration at the official level. The appropriateness of this procedure is illustrated by Felix Meyer's draft of a uniform law on commercial instruments of 1909, by virtue of which the realisation of the Uniform Law at The Hague and Geneva Conferences became possible.[3]

## IV

As above indicated, the central issue in the unification of the laws respecting negotiable instruments is to harmonise the developments within the Anglo-American and the Continental systems. While it is not feasible in this brief *aperçu* to itemise the many divergencies of detail, a brief account of the more salient differences is germane to the present discussion as illustrating the special obstacles to be faced in unifying the subject-matter. As will appear, these differences are technical or environmental rather than basic; they are due to the characteristic attitudes towards business activities in the two groups of laws and to variations in procedural practices, especially with reference to the regulation of commercial matters, or even in the methods of formulating and

[3] Meyer, *Der Entwurf eines einheitlichon Wechselgesetzes nebst Begründung im Auftrage der Aeltesten der Kaufmannschaft von Berlin*, Leipzig, 1909 (Vol. II of *Das Weltwechselrecht*).

interpreting the laws in this field. It should be emphasised, however, that on the fundamental principles, responding to the needs of commerce, there is, and must be, great similarity in the respective systems.

The following may be noted as characteristic sources of divergence in the two groups of laws:

I. In the Anglo-American legislation, there is a tendency to admit standards of reasonableness as measured by mercantile custom and to allow corresponding leeway for judicial discretion in considering extra-statutory practices in the determination of individual cases. On the other hand, in the civil law systems, there is much greater stress upon vigorous application of prescribed rules respecting formal requisites, as well as concerning the periods within which the acts necessary in the circulation or enforcement of an instrument and the procedures to charge secondary parties must be performed. In other words, whereas in essence the common law approach seeks to give effect to the substance of negotiable instruments transactions, reasonably construed by reference to extrinsic evidence, the civil law tends to assume that commercial instrument transactions should be defined so as to be in a high degree automatic and that their significance should be rigidly confined to their four corners as interpreted by definite statutory prescriptions.

Of the many illustrations that might be suggested of these contrasting approaches, the following may be noted: the requirement of 'denomination', originating in the German law and adopted by various other Continental laws; the exclusion in these laws of payment on instalments, acceleration clauses, and ordinarily, stipulations for interest; the necessity in the same laws of stating on the bill the names of the drawee and of the payee, thus excluding bearer bills, the date of issue, the places of issue and of payment, and in the older laws of 'distantia loci', requirements which have in certain respects been ameliorated in many modern revisions by statutory presumptions curing defects in an instrument; the mode of delimiting such periods as the time of presentment for acceptance, the time of payment, etc.; and the differing methods of determining who is a lawful holder.

II. A second and less obvious source of difference is the recognition, in most Continental systems, of commercial law as a special branch of law, to which the ordinary civil or private law is subsidiary. This distinction, established by the Napoleonic codification, is not recognised in the common law, which during the seventeenth and eighteenth centuries assimilated the law merchant under the common law forms of action then in vogue.

Although in a different area, it may be remarked parenthetically, the common law has an analogue, namely, that of the specialisation of law and equity. This resembles the civil law distinction between civil and commercial law chiefly in that it too had an historical origin in the peculiar division of substantive jurisdiction that occurred in England, with separate courts of chancery and with elaboration of a separate body of equitable jurisprudence corresponding to the commercial customs now represented in the French and similar commercial codes.

Related to this separation of the commercial from civil law in the Continent of Europe, is the dispute respecting the questions concerning 'provision du fonds' and, in particular, the development of a technique, quite in contrast with that of the common law, for defining the rights of the holder. While in the Anglo-American systems this is accomplished by a refined scheme of presumptions, the existence in civil law jurisdictions of special commercial actions enables the holder's special claims to be defined for commercial purposes by limitation of the issues to be litigated in such actions involving commercial instruments, to those defined in the commercial code. This allows speedy, efficient protection of the holder, leaving the final disposition of the matter to be resolved, if necessary, in the *via ordinaria*.

III. In the third place, to the extent that the laws affecting commercial instruments are predicated upon the background of the general private and public law of each country, there will be variation corresponding to the doctrines characterising the respective internal laws, which will *pro tanto* affect the interpretation, application, and content of the laws concerning negotiable instruments. Doubtless, the solution of questions such as what constitutes a valid 'signature', whether an obligation arising on a bill requires delivery for completion, how ancillary guarantees may be given, whether a forged indorsement is sufficient to transfer title, not to mention the conception of 'consideration' as contrasted with 'cause', where relevant, must for each country be influenced by the ideas of general legal theory primarily incorporated in the basic 'civil' law of the country in question.

IV. Allied to the foregoing is a fourth source of divergence. The extensive modes of interpreting statutes and the discretion allowed to the judiciary in the Anglo-American systems, as compared with the more formal techniques of interpretation applicable to the civil law codes, should also be taken into account. The common law theory of the judicial function has made it possible in legislation on commercial instruments in the British Commonwealth and the United States to allow broader recourse to

standards of reasonableness and to extrinsic evidence than is compatible with Continental conceptions, as has been suggested before.

V. A subordinate question, which however is not without practical consequences, arises from the fact that certain important enactments, as for example the Negotiable Instruments Law of the United States, constitute more or less comprehensive regulations of commercial instruments, while the more common type of legislation in this field, exemplified by the British Bills of Exchange Act and the Geneva Uniform Law follow the more flexible method of treating specific types of documents, such as bills of exchange, cheques, etc., separately.

VI. A sixth and final source of divergence, in certain respects the most important of all, is to be found in the established commercial customs. Their variations are reflected in features of the respective laws already noted; thus, the determination whether ' denomination ' should be required, whether a signature should be ' propria manu ', and like questions, must necessarily be resolved with due account taken of the established practices. Analogously, the use whether of protest or notice as the principal procedure to be employed in case of dishonour will necessarily be affected by the character and recognition of the notary's office in the particular country. As it is not possible to modify readily such discrepancies in confirmed commercial practice by legislative fiat, it is highly indispensable in the formulation of a uniform law to ascertain and to take into account the relevant commercial practices and circumstances of each jurisdiction to which it may be extended.

## V

It will be prudent, and indeed necessary to the success of such a project, to contain its scope within obvious limitations. In the first place, it should be focused on the well-recognised forms of commercial paper that have been generally utilised in international transactions and, as it were, have furnished the type-documents for the extensive progress already achieved towards unification in this subject-matter, namely, bills of exchange and promissory notes. In other words, instead of a comprehensive coverage of all negotiable instruments as in the United States Negotiable Instruments Law and the recent Mexican *Ley general de títulos y operaciones de crédito* of 1932, it is recommended that the more common, flexible, and precise procedure of dealing primarily and specifically with the recognised instruments of credit payable in money, should be followed. Leaving aside anomalous

types of documents recognised in the laws of particular countries, this will postpone for separate consideration the laws relating to cheques, which are primarily of local circulation, as well as bonds and other forms of investment paper, and the various important classes of documents importing title to goods.

A second limitation is necessitated by the fact that each negotiable instruments law is supplemented by the general private law of the corresponding country. Here also a line should be drawn; to include controversial issues in the national civil laws respecting capacity, *causa* or consideration, or the like, since they affect commercial instruments, would encumber and serve to defeat otherwise well-conceived proposals of unification. Such proposals should be confined to their specific subject-matter, to the so-called 'formal' law of negotiable instruments,[4] exclusive of the related underlying legislation. This of course does not mean that essential problems inherent in the subject should be omitted.

A third possible limitation, corresponding to the criterion adopted in the Rome Draft of a uniform law of international sales of goods, namely, to limit the proposed international unification to foreign bills, is controversial. It is to be noted that in the United States this subject-matter is generally within the competence of forty-eight States, whereas a proposal limited to instruments in inter-State or foreign commerce could constitutionally and far more readily be made effective by treaty or federal legislation. Although the lawyers in the United States and other composite unions, accustomed to duplication of federal and State or provincial laws in certain matters, will perhaps not view the possibility of divergent rules for foreign and inland bills with quite the horror that it commonly excites in certain quarters, such duplication is obviously undesirable, if it can be avoided. In any event, it is difficult to see how 'foreign bills' could be formally defined so as to include all bills, and only such, as circulate in more than one country.

A fourth and quite Draconian technique for delimiting the subject-matter on which uniformity is to be sought, has recently been suggested.[5] This, in sum, is to restrict the scope of the project to the relatively few questions in this view regarded as really indispensable for the *normal* issue and circulation of negotiable instruments. Consequently, this plan would leave the

[4] Cf. Potu, *L'unification du droit relatif à la lettre de change et au billet à ordre*, Paris, 1916, at p. 144.

[5] Leary and Husted, 'An Approach to Drafting an International Commercial Code and a Modus Operandi under Present Laws' (1949) 49 Columbia Law Review 1070.

many intricate questions arising in case of dishonour to be regulated by the various local laws, supplemented with respect to specific conflicts in their possible application by international agreement on corresponding conflicts rules. This conception, the essence of which is that efforts towards unification in this field should be limited to stating a central core of uniformity necessary for international trade, to be enacted as a part of the domestic legislation in each country, contemplates that international agreement as respects international documents should be secured concerning the following :—

1. The formal requisites of negotiability.
2. The normal, but not unusual, modes of transfer.
3. The liability arising upon indorsement without disclaimer, *i.e.*, not attended by qualifications, unusual in the ordinary course of business.
4. The proceedings necessary to charge secondary parties upon dishonour.

In other words, this plan proposes that uniformity in the laws respecting negotiable instruments should be limited to those matters, and those matters only, which are indispensable for the use of the common commercial instruments in the normal course of international trade; unusual or local types of documents, atypical problems or practices, and, in particular, the questions eventuating when the ordinary circulation of a negotiable instrument has been interrupted by dishonour, all these should be excluded. These, it is conceived, should be determined by the applicable national laws and not thrust upon a Procrustean bed of uniformity that would vainly seek to change long-standing local practices. This proposal, it seems to the writer, while not in any way obviating the need for careful study of the subject-matter, does suggest a strategic approach to the problem of unification of the commercial instruments laws, which appears to have special advantages as a basis of departure, at least at the outset, in dealing with the problem.

## VI

A final question relates to the procedure to be followed in establishing uniformity on the basis of a project as above defined. It should be clear that further parallel unification of existing systems would not respond to current needs. Nor should there be any considerable resort to conflict rules as a basis of reconciling questions that should be uniformly resolved. These would be illusory solutions, not promoting expeditious circulation of international instruments, and the present possibilities permit more

substantial progress. There are, however, at least three further possible procedures, each to a degree supported by experience, that deserve attention.

One is the formulation of a uniform or model law under appropriate auspices, with a view to its spontaneous adoption in individual countries. This plan, but over extensive periods of time, has proved eminently successful in the case of the British Bills of Exchange Act and the United States Negotiable Instruments Law. It does not, however, appear that what thus has proved effective within more or less homogeneous political unions will be equally so for an international uniform law.

A second possibility is suggested by the *American Restatement of the Law*. This evades the problem of securing legislative adoption in numerous jurisdictions by the Gordian expedient of autonomous promulgation by the American Law Institute. But it is not conceivable that such a private text could derogate from the positive enactments, except as the parties are permitted to stipulate for its application to individual documents. This of course would involve the difficulties, already noted, that are objected to separate systems for foreign and domestic bills—difficulties which doubtless would be aggravated by the fact that designation as a foreign bill would require notation at the discretion of a party to the bill.

A third method has been commonly utilised in multilateral international legislation, in this subject illustrated notably by The Hague and Geneva Conventions, *viz.*, agreement by treaty to incorporate the proposed uniform legislation in the respective national laws. It may be presumed that this procedure would increase the likelihood of effective adhesion by the participant States and facilitate the adjustment inevitable in an international uniform law. Yet there is a rub; as the experience in The Hague and Geneva Conferences suggests, this method may only promote unity in façade. What should be controlled by practical and scientific considerations is liable to be sacrificed in the atmosphere of negotiation by national delegates to the attainment of apparent unity by compromise on basic issues and allowance of reservations substantially impairing the unity thus seemingly attained. Other objections spring from the circumstance that such procedure would cast the projected uniform law in an inflexible mould, which could be amended only by universal consent; hence, dissatisfaction with particular provisions could be satisfied only by denunciation.

All this indicates that the procedure to be followed in effectuating a projected uniform law is a difficult and important question, which deserves anxious attention. It may be suggested, subject to further consideration, that of the three methods enumerated the

negotiation of a multilateral convention carrying the obligation to enact an agreed uniform law, despite its dangers, would be preferable, if two conditions should be satisfied: (1) that the draft must be adequate; and (2) that the important mercantile countries should actively participate, including particularly Great Britain and the United States. Indeed, without the support of these two countries, commanding at least two thirds of the world's trade, international unification of the laws of commercial instruments, which The Hague and Geneva Conferences failed to achieve, will not be attainable. The feasibility of what is here proposed to serve the interests of international commerce, correspondingly depends in no small degree upon the co-operative interest of the members of the legal profession in the countries concerned.

## VII

This, in conclusion, leads again to the fundamental importance of the assistance which international organisations of jurists from all countries may contribute towards this reform. It it were asked, what part can such organisations take in this effort to adapt existing institutions to modern needs, the answer should be threefold. They can provide the moral support indispensable for the effective prosecution of such endeavours; through their offices, the essential collaboration of experts in the many countries can be facilitated; and their active intervention will serve to ensure that the results are given effect.

It is clear that successful endeavours to unify the laws of commercial instruments will require collaboration of the profession, of law teachers, and of commercial representatives in a large number of countries. In sum, the immediate task is: first, to assemble and to make available the necessary comparative information concerning existing laws and practices; second, to prepare a tentative but exhaustively supported draft proposal as a basis of discussion and criticism; and, third, to secure official acceptance of a definitive revised text.

### Appendix

In connection with the above discussion, it may be of some interest to refer to the Research in Inter-American Law, initiated at the University of Michigan Law School in 1942 under the writer's direction. This Research has been specially organised to promote comparative study of the American laws with the objects: (1) to provide convenient information respecting the laws in force in the Western Hemisphere, especially those of interest to international commerce; (2) to explore in a favourable environment the relations

between the two chief legal cultures, the Anglo-American Common Law and the Continental European Civil Law; (3) to implement the persistent interest in unification of law in the Americas, as evidenced notably in the proceedings of the successive international conferences of American States since 1889; and (4) generally to promote comparative legal science.

Attention in this Research has first been directed to the field of commercial instruments, and with the generous co-operation of the Department of State a number of outstanding lawyers—sixteen in all—recently graduated from the leading law schools of Latin America, have thus far been brought to Ann Arbor to undertake comparative studies of the laws of the twenty-two countries in the Pan-American Union and of Canada in relation to the basic problems in this field. A number of such studies have accordingly been completed and have been for some time in the course of final preparation for publication in English, covering, for example, the Formal Requirements of Negotiable Instruments, Negotiation, Protest, Suretyship, Checks, etc. For description of the general scope and objectives of the Research in Inter-American Law, see the writer's article, 'Research in Inter-American Law at the University of Michigan', *Michigan Law Review*, December, 1944.

In the field of commercial instruments, the following comparative studies of the twenty-two American laws, each of from 350 to 700 manuscript pages, have been completed in connection with the Research:

Hugo Bunge Guerrico, *Los requisitos extrínsicos de letras de cambio.*

Luis M. Ramírez Boettner, *La circulación cambiaria de letras de cambio.*

Raúl Olivera y Borges, *El protesto.*

Manuel García Calderón, *Los instrumentos negociables en el Derecho Internacional Privado.*

Enrique Testa Arueste, *La provisión de fondos.*

Egberto Lacerda Teixeira, *Do cheque no direito comparado.*

Armando Travieso Paúl, *Las cartas de crédito bancarias.*

Jorge Barrera Graf, *El crédito documentado de reembolso.*

Paulo J. da Silva Pinto, *Garantia cambiária e direito comparado.*

Jaime Perriaux, *La acción cambiaria y el tenedor legítimo.*

In addition the following articles have been published, three of which incorporate individual chapters of certain of the above works:

Hugo Bunge Guerrico, 'Unification and Present Status of Negotiability Legislation in America', *Minnesota Law Review*, December, 1944.

Luis M. Ramírez Boettner, 'Capacity under the Negotiable Instruments Laws of the Americas: A Comparative Study', *Michigan Law Review*, December, 1944.

Salvador Itriago, 'Acceptance by Intervention in Bills of Exchange', *Michigan Law Review*, April, 1945.

Juan Díaz Lewis, 'Promissory Notes in the Legislations of the Americas', *Michigan Law Review*, June, 1945.

Raúl Olivera y Borges, 'Waiver of Protest: A Comparative Study', *Michigan Law Review*, August, 1945.

The foregoing studies are to be published in the near future in English and Spanish editions. Meanwhile, two of the above works have already appeared in Portuguese, *viz.*,

Egberto Lacerda Teixeira, *Do cheque no direito comparado inter-americano*, São Paulo, 1947, pp. 517.

Paulo J. da Silva Pinto, *Direito cambiário* (*Garantia cambiária e direito comparado*), Rio de Janeiro, 1948, pp. 551.

There is also in preparation an analytical concordance of the American laws relating to commercial instruments, which will provide the texts of these laws with the necessary documentation.

This series will for the first time provide in a hitherto neglected area a detailed survey of the American laws on negotiable instruments, which it may be hoped will be of general value. For in this subject-matter at least, the American laws reflect the European systems, and in these investigations full use has been made of the European doctrines and jurisprudence in comparison with the American institutions. The subject-matter provides ample ground for comparison of the Anglo-American and Continental systems in an environment favourable to unification.

# RESULTING CHANGE OF LEGITIMATE MINOR'S DOMICILE

## I. Introduction

Although the law of domicile as such is adequately dealt with in practically all treatises on the Conflict of Laws, it is submitted that there is still scope for an analysis of the domicile of legitimate minors other than their domicile of origin. The inquiry is confined to those minors who are subject to parental power in order to keep it within reasonable limits. It is believed that once the guiding principles have been laid bare, no difficulties will be experienced in their application to similar cases where legitimated, adopted and illegitimate children are concerned.

## II. Domicile of Choice

Domicile of choice is commonly contrasted with domicile of origin. For the purpose of our inquiry it is sufficient to note that we have a domicile of choice when an existing domicile is abandoned and replaced by a new one. Both the abandonment and the acquisition of a domicile require certain physical and mental incidents, *factum* and *animus* as they are called. There must be the abandonment and acquisition of residence (*factum*), accompanied by the intention of remaining indefinitely (*animus semper relinquendi* and *animus semper manendi*). Since residence as such is generally held to amount to a 'fact', a minor may abandon or acquire it.[1] But the position is different in respect of the requisite intention. This intention, which is in the nature of a subjective fact,[2] is the very pivot on which all discussions in point will hinge.

## III. Disability of Minors

### (1) *General Position*

The question whether a minor has capacity to acquire a domicile of choice, is differently answered in the various legal systems. For there is no uniform concept either of domicile or of the status of minority.

[1] Wolff, *Private International Law*, Oxford, 1945, p. 109; Schmitthoff, *A Textbook of the English Conflict of Laws*, London, 1945, p. 76; Cheshire, *Private International Law* (3rd ed.), Oxford, 1947, p. 235. See also Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (6th ed.), London, 1949, p. 91.

[2] Schmitthoff, *op. cit.*, p. 76.

The Anglo-American concept of domicile is generally not met with in the Continental legal systems. The latter do not usually require an intention to remain in one country indefinitely.[3] There is then no reason why a minor should not with parental authority establish a domicile of choice. Thus the German Civil Code of 1896 provides: 'A person suffering from absolute or relative disabilities cannot without the consent of his or her legal representatives abandon his or her domicile nor establish a new one'.[4]

The status of minority offers a still greater variety of rules. For the purpose of this article it is sufficient to mention one particularly interesting legal system, namely that of Scotland. The law of Scotland distinguishes between *impuberes* and *puberes*. The latter, being males over 14 or females over 12 years of age, are to some extent capable of managing their own affairs, especially if they have no curators or are in business.[5] To that extent they have capacity to establish a domicile of choice,[6] that is to say, permanent domicile or domicile of succession as distinct from a mere domicile of citation.[7]

However, under English [8] and American [9] law and under the law of some members of the British Commonwealth such as South Africa [10] a minor is not capable of forming the intention of establishing a permanent residence. Even if the disability caused by minority could be cured by intervention of the minor's parent—which is, however, not the case for reasons to be stated later—the difficulty remains that the intention of the minor cannot be held to extend to the time after he or she has attained the age of majority or otherwise lost the status of minority [11] and does, therefore, not amount to an *animus semper manendi*.

### (2) *Marriage*

In English law when an infant daughter marries, her domicile ceases to be that of her father and depends on that of her

[3] Wolff., *op. cit.*, p. 110.
[4] See sect. 8, *ibid.*
[5] Fraser, *Treatise on the Law of Scotland relative to Parent and Child and Guardian and Ward* (2nd ed.), Edinburgh, 1866, pp. 335 *et seq.*
[6] *Arnott* v. *Groom* (1846) 9 Sess.C. 142, at p. 150. See also *Urquhart* v. *Butterfield* (1888) 37 Ch.D. 357, where, however, the point was not decided. See also Dicey, *supra*, pp. 101, 103.
[7] Fraser, *op. cit.*, p. 579; Erskine (*infra*. n. 19), p. 13.
[8] See, *e.g.*, Wolff, *op. cit.*, pp. 109 and 115 *et seq.*; Schmitthoff, *op. cit.*, pp. 69, 85 and 86 *et seq.*; Cheshire, *op. cit.*, pp. 235 *et seq.*; Dicey, *op. cit.*, pp. 102 *et seq.*, 109 *et seq.*
[9] See, *e.g.*, *Restatement of the Law of Conflict of Laws*, American Law Institute, St. Paul, 1934, sect. 30. See also *infra*, nn. 14, 19.
[10] Pothier, *Coutumes d'Orléans*, 1.16; Pollak, S.A.L.J., 1934, pp. 24, 25; Spiro, *op. cit.*, pp. 100–1. But see also (J.) Voet, *Commentarius ad Pandectas*, 5.1.100, which passage will be dealt with *infra*, n. 23.
[11] Spiro, *Law of Parent and Child*, Cape Town and Johannesburg, 1950, p. 101.

husband,[12] even if she marries without the consent of her father.[13] In American law a minor son is in a similar position; on marriage he has capacity to acquire a domicile of his own.[14] In South African law, marriage terminates the parental power altogether; but, nevertheless, a female minor on marriage passes into the power of her husband and acquires his domicile (if it is a different one).[15] This is, however, equally a consequence of marriage for a woman who is of age. Lack of the required parental consent would not, it appears, be relevant to domicile problems unless the marriage is set aside by a competent court.[16]

Foote[17] overlooks the discrimination between males and females in English law, and is of the opinion that minors, male or female, old enough to marry and acquire a home of their own are old enough to change their domicile, and that a conventional law cannot limit their capacity to do so in one case more than in the other. This view, however, it is submitted, loses sight of the fact that the marriage of a minor is ordinarily accompanied by parental consent.

### (3) *Emancipation*

Emancipation leads to similar problems. It must, however, be observed that emancipation is not everywhere recognised. In English law, a parent is not entitled to emancipate his or her minor child[18] nor is the latter emancipated by entering into the public service.[18] But in American law a minor may be emancipated by his or her parents and will in such a case acquire the capacity to elect a domicile of his or her own.[19] The reason for this according to the *Restatement* (Comment) is that since an emancipated minor has to provide for him- or herself, he or she should also have the power to choose his or her home. But it is submitted that maintenance is not the sole factor to be considered in connection with these problems. The law of Scotland knows of emancipation[20] or of forisfamiliation[21] (which probably amounts to the

[12] Schmitthoff, *op. cit.*, p. 87; Wolff, *op. cit.*, p. 116; Cheshire, *op. cit.*, p. 236; Dicey, *op. cit.*, pp. 107, 109, n. 73.

[13] Schmitthoff, *op. cit.*, p. 87.

[14] Goodrich, *Conflict of Laws*, 1927, pp. 52–3; Beale, *Conflict of Laws*, 1935, pp. 212–5; Schmitthoff, *op. cit.*, p. 87; Cheshire, *op. cit.*, p. 236. See also *Restatement*, *op. cit.*, sect. 31 (Comment).

[15] Spiro, *op. cit.*, p. 102. See also Pollak, S.A.L.J., 1934, p. 27.

[16] For details which do not interest here see Spiro, *op. cit.*, pp. 141 *et seq.* and p. 102. See also Schmitthoff, *op. cit.*, p. 87, and Dicey, *op. cit.*, p. 108.

[17] *Private International Law* (5th ed.), London, 1925, p. 93.

[18] Schmitthoff, *op. cit.*, p. 87.

[19] *Restatement*, *op. cit.*, sect. 31; Schmitthoff, *op. cit.*, p. 87; Cheshire, *op. cit.*, p. 236.

[20] Fraser, *op. cit.*, pp. 348 *et seq.*

[21] Forisfamiliation means the departure or extrusion of a child from the family home and takes place when a daughter marries or sets up a separate establishment and when a son does the latter and usually, but not necessarily, when he marries: see Erskine, *Principles of the Law of Scotland* (18th ed.), Edinburgh, 1890, p. 74.

same [22]), but this is hardly material since even an unemancipated minor may have capacity to change his or her domicile, as has already been mentioned. In South African law emancipation is not altogether unknown.[23] However, not only is there no presumption in favour of emancipation, but emancipation often amounts simply to a general consent to a particular class of transactions, in which case the parental power would not terminate. If this is so, the minor still lacks the capacity to change his or her domicile.[24]

## IV. Disability of Parents

Voet [25] holds that a father may consent to his minor child changing his or her domicile. Not only is there little support for that view, but it is inconsistent with the nature of the intention required. In particular, the *animus semper manendi* is indispensable. The parental power again does not ordinarily last longer than the minority of the child [26]; it may terminate even earlier [27] as in cases of marriage and emancipation. The parental consent covers only the period of minority [28] and is, therefore, not sufficient to cure the disability of a minor to change his or her domicile.

## V. Resulting Change of Minor's Domicile

### (1) *The Rule and Its Explanation*

If then neither parents nor minor can form an intention directly aimed at a change of the minor's domicile, the logical corollary might well be that during the subsistence of the status of minority a person retains his or her domicile of origin. However, this view has never successfully been sustained.[29] It is indeed the common opinion that a legitimate (or legitimated) minor follows any change in the domicile of the father.[30] The rule is usually [31] and correctly

22 See, *e.g.*, Erskine, *op. cit.*, p. 92. See also *supra*, n. 20.
23 Spiro, *op. cit.*, pp. 163 *et seq.*
24 Spiro, *op. cit.*, pp. 101–2.
25 *Commentarius ad Pandectas*, 5.1.100. See also Pollak in S.A.L.J., 1934, p. 24, n. 165, and Spiro, *op. cit.* p. 101.
26 Wolff, *op. cit.*, p. 117; Spiro, *op. cit.*, p. 101.
27 Spiro, *op. cit.*, pp. 101, 160 *et seq.*
28 Spiro, *op. cit.*, p. 101.
29 Schmitthoff, *op cit.*, p. 85, rightly remarks that it would be erroneous to reverse the statement that every domicile of origin is necessarily the domicile of a dependent person as it is acquired at birth, *i.e.*, during minority, by saying that a domicile of a dependent person must always be the domicile of origin.
30 See, *e.g.*, Schmitthoff, *op. cit.*, p. 85 (automatic change); Wolff, *op. cit.*, p. 116 (during minority the child shares compulsorily the father's change of domicile); Cheshire, *op. cit.*, p. 236 (any new domicile that the father may acquire is automatically communicated to the child); Graveson, *Conflict of Laws*, London, 1948, p. 75.
31 Dicey, *op. cit.*, p. 102. See also Pollak, S.A.L.J., 1934, pp. 24–25.

stated as follows: the domicile of a legitimate (or legitimated) minor is during the lifetime of his or her father the same as and changes with the domicile of his or her father. Where a father changes his domicile, it is then appropriate to speak of the resulting change of the domicile of his minor child.[32]

It has been said [33] that the rule is based not only on the fact that in the vast majority of cases a child actually has the home of its father, but also on the legal right of the father to the custody of the person of the child and on his corresponding duty to give it a home. But the fact of the minor child living with its father is not necessarily material in respect of domicile as will be shown in the following section; and the reference to the right to, or the duty of, custody which is an incident of the parental power,[34] far from being an unambiguous term,[35] rather begs the question. Again, the father's position as head of the family has been emphasised [36] which is perhaps more in point. It is submitted that the explanation of the rule must be sought in the *vinculum sanguinis* as recognised in law which alone explains the principle of parental power [37] and similar incidents such as the duty of support [38] (where it exists [39]). Marriage involves a similar *vinculum* (though not *sanguinis*), and during the subsistence of the marriage the wife likewise shares the domicile of her husband.[40]

### (2) *Implications of the Rule*

There have been various attempts at limiting or qualifying the rule.

Firstly, according to some writers [41] the rule presupposes that the minor lives with his or her father although this point is much more stressed in respect of a mother who exercises the parental power. But it is submitted that neither case justifies such a view.[42] In the kindred case of a domicile of origin it has never been claimed that the child must—at the time of its birth—stay with its parent. Nor, to fall back again upon the parallel instance

[32] Spiro, *op. cit.*, pp. 100 and 102.
[33] Pollak, S.A.L.J., 1934, p. 25, n. 162.
[34] Spiro, *op. cit.*, pp. 52 *et seq.*
[35] Spiro, *op. cit.*, pp. 52 *et seq.* As to special meaning of custody in the *Restatement* see particularly Spiro, *op. cit.*, pp. 54–55 and 269, n. 22.
[36] Voet, *op. cit.*, 5.1.92, 98; Pothier, *op. cit.*, 1.19; Schmitthoff, *op. cit.*, p. 86.
[37] Spiro, *op. cit.*, pp. 12 *et seq.*, 22 *et seq.*, 25 and 31 *et seq.*
[38] Spiro, *op cit.*, pp. 233 *et seq.*, 247–8.
[39] Spiro, *op. cit.*, pp. 233 and 247.
[40] Spiro, *op. cit.*, pp. 102–3. See also *infra*, nn. 61, 79–80, 84.
[41] See, *e.g.*, Voet, *op. cit.*, 5.1.100. As to the position in respect of a mother who exercises the parental power see *infra*, n. 61 and n. 61.
[42] See also Pollak, S.A.L.J., 1934, p. 25; Wolff, *op. cit.*, pp. 116–7; Spiro, *op. cit.*, p. 103, n. 374.

of marriage, must a married woman necessarily for purposes of domicile live together with her husband.

Secondly, there is a view that if a father changes his domicile the interests of his minor children must not be prejudicially affected thereby.[43] However much modern law considers the interests of minors as of paramount importance,[44] this cannot have the consequence of engrafting an alien element upon the concept of domicile. If the change of the minor child's domicile is only the result of the change of the father's domicile, it can only matter whether a change of the father's domicile has come about, and this depends, besides the requisite residence, solely on his *animus semper manendi*. Whenever, moreover, a father neglects the interests of his child, the court may have cause to interfere[45]; this again has nothing to do with domicile problems.

Thirdly,[46] both Voet[47] and Pothier[48] are of the opinion, which has not been followed by Bijnkershoek,[49] but which has been approved *obiter* in a South African case,[50] that the minor's domicile remains likewise unaffected if the change of the father's domicile has a fraudulent intent. This view has been discussed in an old English case[51] which was, however, not decided on the ground of fraud. Since that case dealt with a surviving mother (as also Pothier did), the English textbooks usually consider the consequences of fraud only in connection with the change of the domicile of the surviving mother.[52] But in more recent times it has been felt that, in view of the modern tendency to equality of the sexes, the rule should likewise apply to a fraudulent change of

[43] *Hull* v. *McMaster and Another* (1866) V. Searle 220 (South Africa) (2 JJ.), at pp. 225–6, *per* Cloete J., who interprets Voet, *op. cit.*, 5.1.92, 94, 97 and 100, to this effect. But this was not the *ratio decidendi*. It is again particularly in connection with a mother exercising the parental power that the incident of the child's interest is often raised: see Gwyer in *Halsbury's Laws of England* (2nd ed.), by Hailsham, Vol. VI, p. 209; Dicey, *op. cit.*, p. 104; see also *infra*, sub. (3) (*b*).

[44] Spiro, *op. cit.*, pp. 7, 20, 99, 201, 208 *et seq.*, 270–1.

[45] Spiro, *op. cit.*, pp. 169 *et seq.*

[46] The following remarks are largely taken over from Spiro, *op. cit.*, pp. 103–4.

[47] *Op. cit.*, 5.1.100. See also Rodenburg, *De jure quod oritur e statutorum diversitate*, 1653, Tit. 2, *pars altera* I, 6 and II, 2, 3; Burge *Commentaries on Colonial and Foreign Laws* (new edition), London, 1907, Vol. II, p. 58.

[48] *Coutumes d'Orléans*, 1.18, 19.

[49] *Quæstiones Juris Privati*, 1.16.

[50] *Hull* v. *McMaster and Another* (1866) V. Searle 220 (2 JJ.), at pp. 225–6, *per* Cloete J. Of the same opinion Maasdorp, *op. cit.*, p. 6.

[51] *Potinger* v. *Wightman* (1817) 3 Mer. 67, which was treated as binding by the House of Lords in the case of *Johnstone* v. *Beattie*, 10 Cl. & F. 42. See also *Re Beaumont* [1893] 3 Ch.D. 490, and the two American cases quoted there (*Ryall* v. *Kennedy*, 40 New York Sup.Ct. 347, and *Brown* v. *Lynch*, 2 Bradf. Surrogate Rep.N.Y. 214).

[52] See, *e.g.*, still the 2nd ed. of Cheshire, *op. cit.*, p. 192, and *Eversley's Domestic Relations* (5th ed.), London, 1937, pp. 406–7.

domicile on the part of a father.[53] Pothier[54] goes even so far as to presume fraud where no reasonable motives for the change of domicile are evident. The correctness of the rule has been challenged[55]; and Wolff[56] most forcefully suggests that in such cases there is no 'true intention' such as is requisite for a change of the domicile. It is submitted[57] that domicile as a concept of general application must be distinguished from domicile as a condition of the exercise of a particular right. The contents of the latter must be gathered from the particular right in question. The intention required for a change of the former has as its object facts, namely permanent residence in the new country,[58] rather than legal consequences,[59] nor does it coincide with motive which is of evidential value only.[60] Such intention is either present, when it may bring about a change of domicile, or is absent, when no change of the domicile will ensue.

It would then appear that, as the resulting change of a minor's domicile does not depend on any intention of the persons concerned, it can likewise not be stayed by any intention or conduct of the persons concerned. And if the resulting change of the minor's domicile is rooted in the *vinculum sanguinis* (to the extent to which it is recognised in law), this position is essentially correct and satisfactory.

### (3) *Parental Power Exercised by Mother*

As complete equality of the sexes, more particularly in regard to domicile, hardly exists in any legal system some special observations are called for on cases where it is not the father, but the mother, who exercises the parental power. It is proposed to discuss separately the cases where the father of a legitimate (or legitimated) child is alive; where such a father is dead; and where a mother exercises the parental power over an illegitimate child.

(a) *Father alive*—During the subsistence of the marriage a married woman ordinarily shares the domicile of her husband[61] which then alone governs that of a minor child.

After the dissolution of the marriage, a woman has the capacity to change her domicile (in many legal systems even if she is a

[53] See, *e.g.*, Dicey, *op. cit.*, p. 103, and Schmitthoff, *op. cit.*, p. 88.
[54] *Op. cit.*, 1.18, 19.
[55] See Jacobs, *Law of Domicile*, Boston, 1887, sect. 243, and Pollak, S.A.L.J., 1934, p. 25.
[56] *Op. cit.*, pp. 144–5.
[57] Spiro, *op. cit.*, pp. 103–4.
[58] See *supra*, sub. II.
[59] *Restatement*, *op. cit.*, sect. 19; Wolff, *op. cit.*, p. 113.
[60] *Restatement*, *op. cit.*, sect. 22; Schmitthoff, *op. cit.*, p. 76.
[61] Spiro, *op. cit.*, p. 104. See also *supra*, n. 40, and *infra*, nn. 79, 80, 84.

minor [62]) unless she marries again when she shares the domicile of the new husband. There may then be a discrepancy between the domicile of the father and that of the mother. On principle, it is the domicile of the father on which that of a minor child continues to depend.

The consequences of a court order, more particularly of a so-called custody order, will be considered separately.

(b) *Father dead*—It is submitted [63] that on the father's death the mother of a legitimate (or legitimated) minor child—since she now ordinarily exercises the parental power without any limitations—fully steps into the shoes of the deceased father, and all the remarks which have been made in respect of the father (see *supra* V (2)) apply *mutatis mutandis*. Indeed even where the mother is assisted by a tutor (guardian) it is only the domicile of the mother which governs that of the minor child.[64]

The case where the mother marries again deserves, however, special attention. Various suggestions have here been offered. Pothier [65] holds that a minor child does not acquire any new domicile of the mother which the latter now takes from the step-father whose domicile she automatically shares. In English law the minor apparently retains his or her last domicile unless he or she lives with his or her mother at the second husband's place of domicile.[66] According to Cheshire [67] the 'power possessed by a widow of changing her children's domicile' [68] is vested in her solely for the welfare of the children, and the presumption that the children follow her domicile (which he assumes) is rebutted if it can be shown that the result is disadvantageous to them, a change in the mother's domicile due to her remarriage more readily operating as such a rebuttal. In my respectful submission this view ought not to be followed; for it can be argued that not only would the 'power of changing the children's domicile' possessed by a father be vested in him solely for the welfare of the children, but the factor of the welfare of the children has no *locus*

[62] *E.g.*, in South Africa; see Spiro, *op. cit.*, p. 161, n. 10.

[63] Spiro, *op. cit.*, pp. 104–5. According to the English case law a mother has the power to change her minor child's domicile after the father's death probably only if the new domicile is advantageous to the child, and the latter will apparently only acquire a new domicile if it accompanies the mother: see *Potinger* v. *Wightman* (1817) 3 Mer. 67; *Johnstone* v. *Beattie* (1843) 10 Cl. & F. 42; *Re Beaumont* [1893] 3 Ch.D. 490. As to fraud, see also *supra*, n. 52.

[64] Pollak, S.A.L.J., 1934, p. 26; Wolff, *op. cit.*, p. 118; Dicey, *op. cit.*, pp. 104–5; Spiro, *op. cit.*, pp. 105–6.

[65] *Op. cit.*, 1.19. See also Burge, *op. cit.*, Vol. II, p. 57.

[66] *Re Beaumont* [1893] 3 Ch.D. 490. See also Schmitthoff, *op. cit.*, p. 87; Wolff, *op. cit.*, p. 118; Dicey, *op. cit.*, pp. 106–7.

[67] *Op. cit.*, p. 237. See also Dicey, *op. cit.*, pp. 102–4, 106–7, and Gwyer, *op. cit.*, p. 209.

[68] This terminology is not adopted here; see particularly sub. IV and V, *supra*.

*standi* where domicile is concerned, as has already been pointed out above.[69] The *Restatement*[70] provides that a mother, on remarriage, communicates her new domicile to her minor children of the first marriage unless she abandons them. It is submitted[71] that any change of the domicile of the mother as the result of her second marriage is brought about by operation of law which originates in the relationship between (second) husband and wife. The minor child of the first marriage does not automatically partake of the latter relationship. But the mother and her (second) husband may, of their own accord, extend this relationship to the minor child of the first marriage by receiving it in their home, as the result of which the said child follows their domicile.

(c) *Mother of illegitimate child*—In many legal systems[72] the mother of an illegitimate minor child—usually, however, only if she is herself of age,[73] is entrusted with the parental power over that child. In such a case the minor's domicile entirely depends on her domicile.[74]

If the mother of an illegitimate child marries a person other than the natural father and acquires her husband's domicile, it is submitted that the position is *mutatis mutandis* the same as where the mother of a minor legitimate child marries again after her husband's death.

If the mother of an illegitimate child marries the natural father, this will in many legal systems be a case of *legitimatio per matrimonium subsequens*[75] as the result of which the minor concerned may attain the status of a legitimated child—which again is broadly the same as that of a legitimate child.[76]

## VI. Court Orders

It remains to deal with the question what the effects of a court order in respect of a minor child are. In most legal systems the courts are competent to make orders in respect of minor children, more particularly for custody, and although such orders usually issue in matrimonial causes, they may also be granted where no matrimonial cause is pending.[77]

[69] See *supra*, n. 45.
[70] *Op. cit.*, sect. 38 (Comment).
[71] Spiro, *op. cit.*, p. 105.
[72] See, *e.g.*, Schmitthoff, *op. cit.*, p. 86; Wolff, *op. cit.*, p. 117; Spiro, *op. cit.*, pp. 41, 104, 280. See also Dicey, *op. cit.*, p. 102.
[73] So in South Africa; see Spiro, *op. cit.*, p. 14.
[74] Spiro, *op. cit.*, p. 104. See also n. 72, *supra*.
[75] Spiro, *op. cit.*, pp. 31–2, 274–5. See also *ibid.*, pp. 35–7, 41–2 (adoption).
[76] Spiro, *op. cit.*, p. 32. See also Wolff, *op. cit.*, p. 118.
[77] As to South Africa, see Spiro, *op. cit.*, pp. 169 *et seq.*

As the law of domicile stands at present, a distinction must at the outset be drawn between those cases where a marriage has been dissolved by a court of law—a judicial separation does not usually amount to such a dissolution [78]—and all other cases.

### (1) *Marriage Not Dissolved*

In many legal systems, such as for example those of England [79] and South Africa [80] a married woman shares her husband's domicile during the subsistence of the marriage, and has no capacity to acquire a separate domicile. The domicile of a minor child of the marriage cannot then depend on hers. For the purpose of citizenship (nationality) South African Statute Law has now introduced the concept of 'responsible parent', meaning the father of a child or, if the custody of the child has been awarded to the mother by the order of a competent court or the father is dead or the child is illegitimate and resides with the mother, the mother of that child.[81] The responsible parent has *inter alia* the power to apply for the naturalisation of a child in his or her custody.[82] However, citizenship and domicile must now more than ever be distinguished in South Africa since the same Statute provides that in principle no woman acquires or loses South African citizenship by reason only of a marriage contracted by her [83] so that husband and wife may have different nationalities, but must have the same domicile.

If a married woman were or—as in some legal systems [84]—in fact is capable of changing her domicile, the remarks which will be made at present apply *mutatis mutandis*.

### (2) *Marriage Finally Dissolved by a Court of Law*

Where the marriage has been dissolved by a court of law a discrepancy may arise between the domicile of the father and that

[78] *Att.-Gen. for Alberta* v. *Cook* [1926] A.C. 444. See also Pollak, S.A.L.J., 1934, p. 28; Schmitthoff, *op. cit.*, p. 86; Wolff, *op. cit.*, p. 121; Cheshire, *op. cit.*, p. 237; Graveson, *op. cit.*, p. 78; Dicey, *op. cit.*, p. 107; Spiro, *op. cit.*, pp. 104, 193 and 218.

*Contra*: many Continental legal systems (as to which see Wolff, *op cit.*, p. 121) and the *Restatement*, *op. cit.*, sects. 28–9, but also 32, which applies both to divorce (as to which see *infra*, n. 91) and to judicial separation.

[79] Pollak, S.A.L.J., 1934, p. 27; Schmitthoff, *op. cit.*, p. 86; Wolff, *op. cit.*, pp. 120–1; Cheshire, *op. cit.*, pp. 237–8; Graveson, *op. cit.*, p. 78; Dicey, *op. cit.*, p. 107.

[80] Wille, *Principles of South African Law* (3rd ed.), Cape Town and Johannesburg, 1949, p. 99; Spiro, *op. cit.*, pp. 104, 193, 218.

[81] South African Citizenship Act, 1949 (Act No. 44 of 1949), in force since September 2, 1949 (*Government Gazette*, 1949, p. 594), s. 1; as to which see Spiro, *op. cit.*, pp. 13, 14, 50, 54, 94 *et seq.*, 221.

[82] Spiro, *op. cit.*, p. 95.

[83] Spiro, *op. cit.*, p. 97.

[84] See n. 78, *supra*.

of the mother.[85] Here again the various legal systems do not present a uniform picture. In English law, even when the court has declared the father unfit to have the custody of the minor child of the marriage, the child still retains his domicile.[86] South African law is ordinarily to the same effect. 'A special order conferring to the mother so much power as would be necessary to cause her change of domicile to have as its result also the change of the minor child's domicile cannot but with difficulties be designed, and it will be more practical to confer instead (full) guardianship'.[87] (Full) guardianship, instead of the ordinary custody, may indeed be awarded to a mother in South African law but only in exceptional cases[88]; it is submitted[89] that in such a case a change of the mother's domicile will also lead to the change of the minor's domicile, save where the change is brought about by a remarriage of the mother.[90] In America again the minor child follows the domicile of the parent to whose custody it has been legally given or, failing a custody order, with whom it lives; but if it lives in such a case with neither parent it retains the father's domicile.[91] Some Continental legal systems are similar.[92]

A court order, as the result of which the domicile of a minor child depends on that of the mother, is as a rule not final, but subject to variation on good cause being shown.[93] It may, therefore, be argued that in this way an element of instability is introduced into the otherwise rigid concept of domicile. However, this element of instability owes its existence less to the possibility of a rescission of the order than to the law which empowers the courts to grant the order and which may be expected to be applied if justified in the circumstances.

Erwin Spiro.[94]

[85] See *supra*, V (3) (a).
[86] Wolff, *op. cit.*, p. 117.
[87] Spiro, *op. cit.*, p. 216.
[88] Spiro, *op. cit.*, pp. 217–8; see also *ibid.*, p. 193.
[89] Spiro, *op. cit.*, p. 218.
[90] See *supra*, V (3) (b).
[91] *Restatement*, *op. cit.*, sect. 32, See also Wolff, *op. cit.*, p. 117, and *supra*, n. 35.
[92] *E.g.*, Swiss law; as to which see Wolff, *op. cit.*, p. 117.
[93] For South African law see Spiro, *op. cit.*, pp. 191–2, 198–200, 231, 306.
[94] Dr. Juris Utriusque (Breslau), LL.B. (Cape Town), Advocate of the Supreme Court of South Africa.

# ARTIFICIAL ISLANDS

In view of the increasing exploitation of the sea-bed and its subsoil which modern science has made possible, new urgency has been given to a problem of international law which, though often discussed, has aroused little interest in the past except in relation to lighthouses. The problem is whether the waters surrounding an artificial structure erected somewhere in the high seas have or do not have the juridical status of territorial waters. The problem is becoming most pressing in regard to installations used for extracting oil from the subsoil beneath the bed of the sea, such as drilling platforms and derricks. It also arises with regard to a miscellaneous collection of other structures such as rubble mounds, cairns and the heads of artesian wells, which in some parts of the world are sunk in the open sea, and also with regard to navigation aids such as buoys, beacons, lightships and lighthouses. When it is remembered that the littoral State exercises sovereignty over the territorial sea [1] and that 'the territory of a coastal State includes also the air space above the territorial sea, as well as the bed of the sea, and the subsoil',[2] it will be realised that it is a matter of some moment to determine whether these structures, of which there may soon be a very great number, do or do not possess territorial waters.

At The Hague Codification Conference in 1930 the rules adopted by Sub-Committee No. II of the Second Committee were as follows :

(i) 'Every island has its own territorial sea. An island is an area of land, surrounded by water, which is permanently above high-water mark.' [3]

(ii) 'Elevations of the sea-bed situated within the territorial sea, though only above water at low tide, are taken into consideration for the determination of the base line of the territorial sea.' [4]

This means that a 'low-tide elevation' (*i.e.*, an elevation that is covered at high-tide but not covered at low-tide), if it is situated within the territorial sea as measured from the mainland, may be used for extending the exterior limit of such territorial sea (a

1 *Acts of The Hague Conference*, 1930, Vol. III, p. 212. See Article 1 of Draft Convention, prepared by the Second Committee.
2 *Ibid.*, p. 213. Article 2.
3 *Ibid.*, p. 219.
4 *Ibid.*, p. 217.

process sometimes referred to as 'leap-frogging'); however, not more than one 'low-tide elevation' may be so used and a 'low-tide elevation' never has a territorial sea of its own. The reason for the distinction, which was strongly supported by Gidel,[5] the French delegate at the conference and the greatest living authority on the law of the sea, is that, if a low-tide elevation is close to the mainland, other landmarks are available by which a mariner can check his position and so know whether he is within territorial waters or not; but that, if a low-tide elevation is further out to sea, it would be unreasonable for it to have territorial waters since it is no longer within range of permanently visible landmarks and is of course not permanently visible itself.

However, the result of the 1930 conference was that the view of many governments (including the United Kingdom)[6] that, in order to have territorial waters, an island must be capable of occupation and use, was not adopted. Gidel regretted the committee's definition of an island capable of having territorial waters and he declined to accept it when, writing some years after the conference, he formulated his own definition.

This was as follows:

'Une île est une élévation naturelle du sol maritime qui, entourée par l'eau, se trouve d'une manière permanente au-dessus de le marée haute et dont les conditions naturelles permettent la résidence stable de groupes humains organisés.

*Sont assimilées aux îles naturelles les îles artificielles satisfaisant aux mêmes conditions* et dont la formation par l'action de phénomènes naturels a été provoquée ou accélérée au moyen de travaux'.[7]

The italicised portion above is, however, subject to the following vital footnote, inserted by Gidel.

'Cette assimilation n'entraîne d'office les conséquences juridiques inhérentes à la notion d'île que dans le cas où les îles de cette sorte se trouvent au moins partiellement dans la mer territoriale d'un Etat et où l'attribution à ces îles d'une mer territoriale

[5] Gidel, *Le Droit International Public de la Mer*, Vol. III, Paris, 1934, p. 700, n. 1.

[6] The United Kingdom Government had stated in its reply, 'An island is a piece of territory surrounded by water and in normal circumstances permanently above high water. It does not include a piece of territory not capable of effective occupation and use.

'His Majesty's Government consider that there is no ground for claiming that a belt of territorial waters exists round rocks and banks not constituting islands as defined above, and would view with favour an international agreement to this effect in order that there may be no doubt as to the status of the waters round such rocks and banks and round artificial structures raised upon them'. *Bases of Discussion*, Vol. II, p. 53.

[7] Gidel, *op. cit.*, Vol. III, p. 684.

n'a pas pour conséquence la chevauchement de la mer territoriale à elles ainsi attribuée sur la mer territoriale d'un autre Etat '.[8]

The rather terse definition of an island by Sub-Committee No. II, which, as we have seen, Gidel refused to accept, has itself never been authoritatively interpreted. Even granted that the old criteria of occupation and use, or even ' capability of effective occupation and use ' are not indispensable to an island, it still has to be determined how large an area of land, ' surrounded by water ', and ' permanently above high-water mark ', has to be before it qualifies as an island. Can it be that a mere pin-point rock, provided it is a high-tide and not just a low-tide elevation, is entitled to have a territorial sea around it? Surely not. In view of the precautions deliberately taken to limit the effect of low-tide elevations, even large ones, on the territorial sea, it can hardly have been the intention to allow every single high-tide elevation, however small, to have territorial waters. There was in fact a common principle underlying the approach of Sub-Committee No. II to the two problems. This principle was, as already indicated, visibility by the mariner. Accordingly, it is suggested that by ' area of land ' is to be understood ' an appreciable surface above the sea visible in normal weather conditions ', and it is only if an island, natural or artificial, fulfils this condition that it possesses the juridical status of an island and can qualify for the possession of territorial waters, though it still remains to be seen whether artificial as opposed to natural islands can properly be regarded as having them and in what circumstances.

Assuming therefore that an artificial island, no less than a natural island, must, in order to have territorial waters, at least fulfil this basic requirement of being visible in normal weather conditions, there is one type of artificial island which can hardly fail to pass the test of visibility. I refer, of course, to lighthouses. These structures, whose essential quality is visibility by mariners even in bad weather conditions, have been the subject of a certain amount of treatment by the writers. In the *Fur Seal Arbitration* (1893) Sir Charles Russell, the Attorney-General, argued in favour of attributing territorial waters to lighthouses. ' I wish to point out,' he said, ' that I think my friend has, for the moment, forgotten that if a lighthouse is built upon a rock or upon piles driven into the bed of the sea, it becomes, as far as that lighthouse is concerned, part of the territory of the nation which has erected it, and as part of territory of the nation which has erected it, it has, incident to it, all the rights that belong to the protection of the

[8] *Ibid.*, footnote 1.

territory—no more and no less.' 'If it should be five miles out?' he was asked, and he replied 'Certainly, undoubtedly. The most important lighthouses in the world are outside the three-mile limit.' It being then pointed out to him that the Eddystone lighthouse was built on a rock fourteen miles from the land, Russell went on, 'That point has never been doubted; and if it were, there is ample authority to support it. The right to acquire by the construction of a lighthouse on a rock in the ocean a territorial right in respect of the space so occupied is undoubted '.[9]

It may be asked what the *Fur Seal Arbitration* had to do with lighthouses. The matter arose because the question was put to Russell by the Americans. 'If a lighthouse were erected by a nation in waters outside of the three-mile line, for the benefit of its own commerce and that of the world,' and 'if some pursuit for gain on the adjacent high sea should be discovered which would obscure the light or endanger the lighthouse or the lives of its inmates, would that government be defenceless?'[10] Russell had to refute, and to refute firmly, the argument that the principle of the freedom of the seas for which he was contending meant unlimited licence. This no doubt accounts for the rather dogmatic tone adopted by Russell.

Westlake was critical of Russell's view. 'It would be difficult', he said, 'to admit that a mere rock and building, incapable of being so armed as really to control the neighbouring sea, could be made the source of a presumed occupation of it, converting a large tract into territorial water.'[11]

Russell's contention was also criticised by Oppenheim in his report to the Institute of International Law for its Christiana session in 1912. 'Si cette assertion de Sir Charles Russell était juste', he said, 'il serait nécessaire d'accorder à tout Etat qui a bâti un tel phare un droit de souveraineté sur la mer territoriale entourant ce phare; mais, à mon sens, cette assertion n'est pas justifiée. Je crois que l'assimilation des phares aux îles est de nature à induire en erreur et qu'il vaudrait mieux traiter les phares sur le mème pied que les bateaux phares ancrés.[12] De même qu'un

[9] Moore, *Int. Arb.*, Vol. I, pp. 900–1.
[10] *Ibid.*, p. 900.
[11] Westlake, *International Law*, Vol. I (1904 ed.), p. 186.
[12] The present editor of *Oppenheim* remains loyal to this view. He writes: 'It is tempting to compare such lighthouses with islands, and argue in favour of a maritime belt around them; but such an identification is misleading. Lighthouses must be treated on the same lines as anchored lightships. Just as a State may not claim sovereignty over a maritime belt around an anchored lightship, so it may not make such a claim in the case of a lighthouse in the open sea' (Oppenheim, *International Law*, Vol. I (7th ed.), p. 454). Or again, 'Since the open sea is free, no part of it can be the object of occupation, nor can rocks or banks in the open sea, although lighthouses may be built on them' (*ibid.*, p. 508).

Etat n'a pas le pouvoir de réclamer souveraineté sur une mer territoriale à l'entour d'un bateau-phare ancré, de même il n'a pas le pouvoir de réclamer cette souveraineté sur une zone maritime à l'entour d'un phare dans la mer.' [13]

Nevertheless, as Gidel points out,[14] Oppenheim's opinion must not be taken to mean that territorial waters never surround a lighthouse. Where a lighthouse is placed on a promontory of the mainland or a genuine island, territorial waters of course attach, because they would in any case attach to the promontory or island. For Gidel, whether a lighthouse has territorial waters or not, is not so much a question of the nature of the lighthouse itself as of the type of elevation on which it is built. 'Le statut juridique d'un phare ne dépend pas de l'existence du phare lui-même, mais de la nature de l'élévation du sol sur laquelle il est construit.' [15] Or again 'Ce principe qu'il n'y a " île " que s'il y a non seulement émersion permanente, mais émersion d'une surface suffisante pour être pratiquement habitée, doit être appliquée à la question du statut juridique des phares '.[16] And again 'une " île " qui sert de support à un phare possède une mer territoriale; une autre élévation du sol marin non susceptible de recevoir la qualité juridique d'île ne donne pas lieu au tracé d'une mer territoriale du seul fait qu'un phare est édifié sur elle '.[17] However, he provided for a special category of lighthouses situated within 'historic waters'. 'Il y a lieu, bien entendu, de réserver le cas où ces phares seraient élevés dans des eaux à considérer comme " historiques ".' [18]

Westlake, despite his criticism of Sir Charles Russell, was not entirely happy about denying territorial waters to lighthouses altogether. 'It might however be fair', he said, 'to claim an exclusive right of fishing so near the spot that, without the light, fishing there would have been too dangerous to be practicable.' [19]

For this he was criticised by Oppenheim and also by Gidel.[20] Oppenheim would lay down the rule definitely. 'Il n'y a pas de droit de souveraineté sur une zone de la mer qui baigne les phares.' [21] In this attitude he is supported, among the more modern authors, by Jessup, who writes: 'It would be dangerous doctrine in many parts of the world to allow States to appropriate new areas of water by means of structures on hidden shoals '.[22]

[13] *Annuaire*, 1913, p. 410.
[14] Gidel, *op. cit.*, Vol. III, p. 678.
[15] *Ibid.*, p. 677.
[16] *Ibid.*, p. 676.
[17] *Ibid.*, p. 679.
[18] *Ibid.*
[19] Westlake, *op. cit.*, Vol. I, p. 186.
[20] Gidel, *op. cit.*, Vol. III, p. 679.
[21] *Annuaire*, 1913, p. 410.
[22] Jessup P.C., *The Law of Territorial Waters and Maritime Jurisdiction*, New York, 1927, p. 69.

Gidel, as we have seen, started from the premise, which is undoubtedly correct, that semi-submerged rocks on the high seas have no territorial waters. He contended strenuously that this remained the case even if installations were built on such rocks. 'Ces ouvrages n'en font pas juridiquement des îles.'[23] Drawing attention to the Bell Rock light (off the Forfarshire coast) and to the Eddystone lighthouse, both of which are constructed on such rocks, he said: 'Ni l'une ni l'autre ne comporte autour d'elle de mer territoriale'.[24] For these and his other contentions Gidel was not without authority, authority subsequent moreover to the unsubstantiated and somewhat pontifical assertion of Sir Charles Russell in 1893.

Gidel's reasoning was based on the decision of the Board of Trade in 1905 to release two French crabbers arrested for fishing within three miles of the Eddystone lighthouse, which was in turn based on the decision of the Foreign Office and Admiralty in 1902–1903 not to question the right of French fishermen to fish within three miles of the light at Seven Stones Rock.

Both decisions were arrived at despite the strong protests of the Devon and Cornwall Sea Fisheries Committees respectively.[25]

The question may be asked whether Gidel, who strongly supports these decisions, does not read too much into them, or at least into the *Eddystone Case*. There was in the *Eddystone Case* no finding, let alone a judicial finding, that the zone concerned was not within territorial waters.[26] The two cases were materially different. In the *Seven Stones Rock Case* there was, under general

[23] Gidel, *op. cit.*, Vol. III, p. 696.
[24] *Ibid.*
[25] *Ibid.*, pp. 695–6.
[26] In regard to the *Seven Stones Rock Case*, Lord Cranborne, replying to a question in the House of Commons, said 'We are advised that fishing off the Seven Stones is not within British territorial waters, and the right of foreign boats to fish there cannot, therefore, be contested' (see *Fish Trades Gazette*, April 4, 1903, p. 21). The administrative decision with regard to the *Eddystone Case* was not expressed in such clear terms as the following extract from *The Times* of October 4, 1905, makes plain. 'Reference was made at a meeting of the Devon Sea Fisheries Committee, held at Newton Abbot yesterday, to the complaints of Devon and Cornish fishermen respecting the presence of French fishermen in the neighbourhood of the Eddystone. The Board of Agriculture and Fisheries had been communicated with and asked to give an opinion as to the international rights of fishing round a rock such as the Eddystone. The following reply was received: "You enquire whether that rock is considered to be within British exclusive fishing limits, and I am to say that the Board are not in a position to express an authoritative opinion in the matter. I am, however, to state for the information of your committee that a similar question arose in 1902 with respect to the Seven Stones rock, off the Scilly Islands, when the Cornwall local fisheries committee were informed by the Foreign Office that no sufficient grounds existed for contesting the right of the French boats to fish off those rocks". The committee expressed surprise at the decision that a rock which was recognised as British and was inhabited by lighthouse keepers was not considered as within the territorial limit for fishery purposes'.

international law, quite apart from the provisions of certain fishery conventions (see below), no doubt that the French fishing vessels were outside territorial waters for the two reasons that this was a permanently submerged reef and that the light was a lightship not a lighthouse. The Eddystone lighthouse is, however, built on a rock that dries at low tide. Consequently the decision of 1905 ought not to have been based on the supposed analogy of the *Seven Stones Rock Case*, and it is therefore scarcely authority for the proposition that a lighthouse built at no matter what expense on a rock that dries at low tide can never have territorial waters.

The true explanation of the leniency of the British Government with regard at least to the incident in 1905 does not lie in any theories it may have held as to the legal position of the waters surrounding lighthouses. Other considerations were present. There was a long history of fishing disputes between Great Britain and France, which the 1839 Convention [27] between the two countries had helped to settle without entirely succeeding in doing so. This Convention reserved for British fishermen 'the exclusive right of fishery within the distance of three miles from the low-water mark, along the whole extent of the coasts of the British Islands' (Article 9). In 1882 the still more famous North Sea Fisheries Convention [28] was signed, and in this the same formula was used but with the addition of the words 'the dependent islands and banks' (Article 2). In 1901 another Convention was signed between England and Denmark [29] in which for the first time mention was made of rocks. The formula was as follows: 'The subjects of His Majesty the King of Denmark shall enjoy the exclusive right of fishery within the distance of three miles from low-water mark along the whole extent of the coasts of the said islands as well as of the dependent islets, rocks and banks' (Article 2). Commenting on this, Fulton, an authority on the history of fishing disputes, says, 'The article defining the territorial waters is the same as in the North Sea Convention, except that islets and rocks are included, which thus gets rid of some possible difficulties in interpretation, such as have arisen in connection with the Eddystone and Bell Rock'.[30]

[27] *Convention between Great Britain and France defining and regulating the limits of the exclusive right of the oyster and other fishery on the coasts of Great Britain and France.* XXVII, B.F.S.P. (1838–9), p. 983.

[28] *Convention between Great Britain, Belgium, Denmark, France, Germany and the Netherlands for regulating the police of the North Sea Fisheries.* LXXIII, B.F.S.P. (1881–2), p. 39.

[29] *Convention between Great Britain and Denmark for regulating the fisheries outside territorial waters in the ocean surrounding the Faröe Islands and Iceland.* XCIV, B.F.S.P. (1900–1), p. 29.

[30] Fulton, *The Sovereignty of the Sea*, Edinburgh and London, 1911, p. 649.

Commenting also on the difficulties caused by the decisions of 1902 and 1905 and the complaints of the Cornwall and Devon Sea Fisheries Committees, Fulton states: 'Similar complaints have been made concerning the Bell Rock, which lies about ten miles east-south-east of Arbroath, Forfarshire, and has a lighthouse upon it. It is entirely covered at high-water; at the ebb of spring tides it is uncovered to a depth of four feet while at low-water of neap tides the top of the rock is just visible, and would then probably acquire validity for the measurement of three miles from it and around it, if rocks had been included in the Conventions, as they are now included in the recent Convention [31] between this country and Denmark concerning Iceland and the Faröes. The cases of the Seven Stones and the Eddystone are, however, on a different footing'.[32] And why are the cases of the Seven Stones and the Eddystone on a different footing? Because in the Convention or Conventions applicable to the coast concerned in those cases there had been no mention of rocks.

The decisions relating to the Eddystone and the Bell Rock turned, therefore, more upon an interpretation of these fishery Conventions than upon any general rule of international law with regard to lighthouses. The *Eddystone Case* (wrongly based on the *Seven Stones Case*) turned in particular upon an interpretation of the 1839 Convention because, although it is a disputed point, the better view is that the 1882 Convention did not apply to the coasts of Devon and Cornwall.[33] The 1839 Convention, it will be remembered, made no mention of 'islands'.

This alone might be a simple explanation of the decisions to release the French fishing vessels (the Eddystone Rock being fourteen miles from the nearest land) were it not for the fact that the Queen's Advocate ruled in 1853 that islands were to be deemed to have been included in the 1839 Convention, and this ruling does not appear to have been challenged.[34]

However, there was certainly no mention of rocks, express or implied, in the 1839 Convention.

Enough has now been said to show that, if the assertions of Sir Charles Russell in 1893 must be regarded as too dogmatic, there is equally reason to doubt whether the contentions of Oppenheim and Gidel are neccssarily correct statements of the rule of international law with regard to lighthouses.

[31] *E.g.*, the 1901 Convention.
[32] Fulton, *op. cit.*, pp. 642–3. Fulton has already made the point that the *Eddystone Case* was itself 'somewhat different' from the *Seven Stones Rock Case*, at p. 642.
[33] *Ibid.*
[34] *Ibid.*, p. 618.

A different view is taken by Sφderqvist, who for practical and historical reasons favoured the view that lighthouses could have territorial waters.

'Il saute pourtant aux yeux', he said, 'que le montage et l'administration d'un phare permanent constitue par excellence, s'il y a intention de posséder, chose présumable, l'occupation de son emplacement et, sans conteste raisonnable, aussi de quelque espace de mer environnant. Vu encore l'utilité publique de l'entreprise, on soutiendrait à bon droit que construits et exploités en plein condominat par tel Etat, voire loin de ses côtes, les phares agrandiraient définitivement son domaine en forme de points de terre avec la zone presque fatale des trois minutes au moins, à défaut d'une reservation prompte des autres. Ces installations sont de si haute importance à la navigation qu'elles ne resteraient pas longtemps inconnues, et leurs détention et gestion tolérées à titre précaire seul s'écarteraient tant de l'ordre normal que pour les eaux communes, l'absence d'une contradiction devrait être interprétée comme approbation.

'Mais s'il en est ainsi des phares érigés en haute mer, ceux en mer nationale et surtout dans un détroit tellement sillonné que le Sund entraîneront de même ou peut-être à plus forte raison une extension du territoire de leur auteur'.[35]

If then the authorities in the matter of lighthouses are uncertain and divided, it is necessary to discover a more general principle of international law from which an appropriate rule can be deduced. This, it so happens, is to be found in the law relating to islands themselves, and the rule thus deduced is wide enough to cover not only lighthouses but also artificial constructions generally. It will be remembered that at The Hague Conference in 1930 there was disagreement as to whether occupation and use or even 'capability of effective occupation and use' were required in order to give a high-tide elevation of the sea-bed the juridical status of an island. The definition finally arrived at by Sub-Committee No. II did not insist on these requirements, although, as we have seen, it left undetermined the size and degree of visibility which an area of land must attain to before qualifying as an island. Sub-Committee No. II, however, added the following important observation to its definition of an island.

'The definition of the term "island" does not exclude artificial islands provided these are true portions of the territory and not merely floating works, anchored buoys, etc. The case of an artificial island erected near to the line of demarcation between the territorial waters of two countries is reserved.

[35] Sφderqvist, *Droit international maritime suédois*, Paris, 1930, pp. 92–3.

'An elevation of the sea-bed, which is only exposed at low-tide, is not deemed to be an island for the purpose of this Convention (see, however, the above proposal concerning the base-line).'[36]

The reason why Sub-Committee No. II decided not to exclude artificial islands 'provided these are true portions of the territory', as well as the reason why Gidel advocated in certain circumstances the 'assimilation' of artificial to natural islands so long as they fulfilled the same conditions, was no doubt that it is sometimes extremely difficult to tell whether an island is natural or artificial. If a natural island is in process of gradually disappearing beneath the waves and it is decided to erect earthworks so as to keep the island above the level of the sea, is that island natural or artificial? Again, if, in the well-known case of *The Anna*,[37] the 'little mud islands composed of earth and trees drifted down by the river', which were the subject of Lord Stowell's judgment, had been 'embanked and fortified', would they then have been natural or artificial? The fact is that it is not of primary importance whether an island is natural or artificial. This is not the real distinction that has to be made. The one essential distinction from the point of view of international law is whether an object exposing a surface above the level of the sea at high-tide qualifies or does not qualify for the juridical status of an 'island'.

The effect of Sub-Committee No. II's definition of an island is, therefore, to recognise the principle that there is no inherent or *a priori* objection to allowing artificial islands to have territorial waters. This was also the view of certain governments as expressed in their replies. Thus Germany stated, 'Artificial islands (artificial constructions) should be assimilated to natural islands, provided that they rest on the sea bottom and have human inhabitants'.[38] The Netherlands stated simply, 'An island should be understood to be any natural or artificial elevation of the sea bottom above the surface of the sea at low tide'.[39] Gidel criticised the observation as it finally emerged as being too loose, although it will be remembered that he too was prepared to take artificial islands into account in certain circumstances.[40]

As a means of codification The Hague Conference of 1930 was of course a failure. *De lege ferenda* it achieved nothing. Nevertheless the work of the Second Committee and its two sub-committees has generally been considered to be of the utmost value and

[36] *Acts of the Conference*, Vol. III, p. 219.
[37] (1805) 5 C.Rob. 373.
[38] *Bases of Discussion*, Vol. II, p. 52.
[39] *Ibid.*, p. 53.
[40] See above.

authority as a formulation of *lex lata*. The formulation by Sub-Committee No. II of the rule governing innocent passage of warships through international straits [41] was followed by the International Court of Justice in the *Corfu Channel Case*.[42] A no less handsome tribute to the work of The Hague Conference was paid by the Secretary-General of the United Nations in his *Survey of International law*, prepared in connection with the work of the International Law Commission.[43]

It is sometimes advanced as an *a priori* objection to permitting artificial islands to have territorial waters that a State could thereby, by building a series of such islands, expand its territorial waters indefinitely. There is little force in the objection, because it is an undoubted rule of international law that a State can already construct artificial formations, such as embankments, breakwaters, dykes and the like, ' as far into the sea beyond the low-water mark as it likes, and thereby gain considerably in land and also in territory since the maritime belt (which is at least three miles wide) is now to be measured from the extended shore '.[44] Similarly, Jessup immediately after denying territorial waters to lighthouses as such, writes, ' on the other hand it should be conceded that where dredging operations or the like result in the formation of permanent " made land " the coast of the State and its territorial waters are extended accordingly. This would also be true of a stone jetty or breakwater connected with the shore '.[45]

If then it is accepted as a principle of the *lex lata* that artificial islands have territorial waters, it remains to be determined which types of artificial construction qualify as artificial islands and which do not. The answer to this question depends on two considerations. First, an artificial island must be an island in the same sense that a natural island is an island; that is to say, it must be ' surrounded by water ', be ' permanently above high-water mark ' and also, it is submitted, it must show ' an appreciable surface

[41] *Acts of Conference*, Vol. III, p. 220.

[42] I.C.J. Reports. *Corfu Channel Case* (Merits), p. 28.

[43] The Secretary-General wrote as follows:—' In this branch of international law the task of codification will probably proceed on the basis of The Hague Codification Conference of 1930 and of the preparatory work which preceded it. No expression of opinion is called for here on the question whether the results of that Conference may legitimately be called a failure. It will be noted that the Conference produced some agreed instruments in the form of Articles on the Legal Status of the Territorial Sea—a detailed and valuable document—and on the base line, both in general and with regard to the particular cases of bays, islands, groups of islands and straits.

' There is general agreement that the *Bases of Discussion*, the documentation on which they were based and the discussions in the relevant Committees provided material of the utmost usefulness '. A/CN. 4/1 Rev. 1 of February 10, 1949, at p. 43.

[44] Oppenheim, *op. cit.*, Vol. I (7th ed.), 516.

[45] Jessup, *op. cit.*, pp. 69–70.

above the sea visible in normal weather conditions'. Secondly, in so far as it is an artificial as opposed to a natural island, it must nevertheless be a 'true portion of territory' or, as it might be better put, it must be 'of the nature of territory'. There are strong grounds for arguing that an artificial island should also be a permanent rather than a temporary installation because it could hardly be expected that every time a structure is erected on piles driven into the sea-bed, even if only for a temporary purpose, it should carry territorial waters with it. Such a principle would defeat the primary object of enabling the mariner to know from his observations, supported by his charts, whether or not he is within territorial waters. On the other hand there is no evidence to show that a greater degree of permanence is required of an artificial island than of a natural island, and even a natural island is permanent only in a relative sense. Islands have been known to disappear and even in the absence of such a cataclysm their shores (as indeed those of the mainland itself) are subject to erosion and accretion causing the extent of their maritime belts to vary from time to time. Similarly, in cases where a breakwater or a causeway is built out to sea from the mainland, the actual limit of the territorial sea varies in proportion as the installation concerned is extended or allowed to collapse.

In the case of artificial islands a degree of permanence sufficient for all practical purposes is attained by the requirement that they be 'of the nature of territory'. An installation that is there today and gone tomorrow such as an experimental drilling-rig hardly satisfies such a test. On the other hand, the test is satisfied by a structure such as a rubble mound even if the mound is subject to the natural and gradual process of disintegration. Still more is the test satisfied by a lighthouse, which is actually inhabited as well as being built and maintained at great expense. Objects of a smaller nature such as cairns and walls round artesian wells satisfy neither the one test nor the other. They neither expose a sufficient surface above the sea so as to be always visible in normal weather conditions nor are they 'of the nature of territory'. As for beacons and buoys they naturally satisfy the test of visibility, but they are not 'of the nature of territory' and so they do not have territorial waters.

In conclusion, it is therefore submitted that, although it is not possible to enumerate them here, there are already, *de lege lata*, certain artificial structures which have territorial waters. There are other such structures which do not have territorial waters. In their case however—and they are mostly structures built recently in relation to the exploitation by modern science of the sea-bed

and its subsoil—there are grounds for examining, at least *de lege ferenda*, the suggestion of the International Law Commission that ' for works and installations established in the waters of the high seas for working the sea-bed and subsoil special security zones should be set up, but they could not be classed as territorial waters '.[46] This seems the right approach to the problem and international lawyers will await with interest the further recommendations of the International Law Commission, particularly as to the nature of the special régime or régimes proposed and the category of installations qualifying for these régimes.

D. H. N. Johnson.

[46] Report of the International Law Commission covering its second session, June 5 to July 29, 1950. General Assembly, Official Records: Fifth Session, Supplement No. 12 (A/1316), p. 22.

# NOTES

## United Nations General Assembly, 1950

### *United Action for Peace*

The division of authority between the General Assembly and the Security Council for the maintenance of peace and security, and the scope of the Assembly's powers are hard to discern in the Charter. But in Resolution A/1481 [1] the Assembly took decisive steps in extending its authority at the expense of the Security Council and in ostensibly carrying out the policy of the Charter.[2] Briefly the Resolution amounts to this : where the Security Council is prevented from acting under Chapter VII of the Charter by the negative vote of a permanent Member, the Assembly may consider the situation and recommend the use of armed force, if necessary, by Members to maintain or restore peace; units of armed force are to be held available by Members for use upon the recommendation of the Security Council or General Assembly.

The provisions of paragraph 1 of the Resolution, if looked at closely, are seen to stand on a shaky foundation : '*if the Security Council, because of lack of unanimity of the permanent Members, fails . . .*'. In a case of a threat to or breach of the peace, the Council's failure might come about because it did not place the case on its agenda at all; or because, having determined under Article 39 that one of these conditions existed, it took no further effective steps; or because the steps it did take appeared to fall far short of what was called for. The cause of failure may be either a negative vote of a permanent Member, which bars the adoption of an effective Resolution, or the fact that there is no majority in favour of it and the Council adopts a weak resolution or none at all. The choice in the Resolution of only one of the possible causes of failure is curious and seems to rest on the false assumption [3] that any proposal under Chapter VII which does not secure a majority of votes in the Council must be bad and that the Council cannot then be regarded as having 'failed' so as to justify intervention by the Assembly;

[1] For text see Documents, below.
[2] See R. W. Tucker in this Quarterly (January, 1951), pp. 33–38.
[3] Is there a hidden premise that, of the draft resolutions which fail to secure a majority of votes in the Council, the greater proportion are those sponsored by the U.S.S.R.?

'*where there appears to be a threat to the peace . . .*'. In a given case the Security Council may already have determined that one of these conditions exist, but if it has not then, under this provision, it will fall to the Assembly to do so. If Articles 10, 24 and 39 of the Charter are read together [4] the Assembly may be held to have such authority, since it has at least a secondary responsibility for the maintenance of peace and the power to determine the existence of threats to or breaches of the peace is not with certainty reserved exclusively to the Security Council;

'*shall consider the matter immediately . . .*'. It is generally agreed that Article 12 (1) does not preclude *discussion* in the Assembly of a case with which the Council is dealing or even recommendations, if they are of a political character and do not encroach on the security functions of the Council;

'*with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary . . .*'. This provision is the core of the Resolution. It cannot, as far as recommendations for the use of force go, rest upon Article 14 since that is confined to measures of peaceful adjustment. The attempt to justify it by reference to Article 10 seems to be grounded on the fallacy that that Article gives the General Assembly powers of recommendation, on questions relating to the maintenance of peace, wider than those set out in Article 11 and that in using these wider powers the Assembly is free of the limitation found in Article 11 (2).

The powers of the Assembly set out in Article 11 are already implicit in Article 10, and the Assembly could do all [5] that is contained in Article 11 even if that Article were deleted from the

[4] Article 39 is ambiguous since 'The Security Council shall determine . . . (Le Conseil de Sécurité constate)' might mean either that it is the exclusive function of the Security Council to determine the existence of these conditions; or that, when these conditions exist (objectively) the Council *must* declare it. In favour of the second interpretation it may be pointed out that a 'determination' under Article 39 is not only a finding of fact but a legal act, which the Council is bound by its 'primary responsibility' under Article 24 to perform in a proper case, and which enables it to take 'decisions' binding on Members. If then the existence of these conditions is a question of fact, the Assembly is as much entitled as the Council to determine it, though its 'determination' is not a legal act.

[5] There is a minor difference in that under Article 10 the Assembly may make recommendations 'to Members' but under Article 11 (2) to 'the State or States concerned', that is to say, to certain Members *and non-Members*; so that strictly the Assembly may address itself to all Members but not non-Members (Article 10), and to such Members or non-Members as are 'States concerned' (Article 11 (2)). But this is only an apparent limitation upon Article 10, since even without Article 11 (2) the Assembly could address itself to non-Members by reason of Articles 2 (6) and 35 (2).

Charter; but the drafters judged it necessary in Article 11 not only to set out the powers implicit in Article 10 a little more fully, as showing both what the Assembly can do and what, on certain matters, it may be expected to do, but also to impose an important limitation. They added Article 11 (4)[6] to make it clear that Article 11 is not, however, an exhaustive enumeration of the Assembly's powers. The question, therefore, is whether the Assembly in dealing with a question relating to the maintenance of peace is subject to the limitation set out in the last sentence of Article 11 (2).[7]

If a threat to or breach of the peace were brought before the Assembly, it would without doubt be 'a question relating to the maintenance of international peace and security' provided for in Article 11 (2); but in saying that the Assembly deals with it under Article 10 and not Article 11 (2) there is a distinction without any difference: the question, the parties, the procedure are the same. How can the power to recommend be different? Article 11 (4) does not help; for it does not say '*Nothing* in this Article shall limit', thereby freeing the Assembly of the limitation in Article 11 (2); nor does it provide that the powers set out in Article 11 (2) are not to be regarded as limiting the powers set forth in Article 10; it says simply that the Assembly has powers under Article 10 other than the power to handle matters relating to the maintenance of peace.[8]

The conclusion seems unavoidable that where a question relating to the maintenance of peace is brought before the Assembly, Articles 10 and 11 (2) must in effect be read as one, and that the Assembly is therefore precluded from recommending 'action', which must, whatever may be its exact meaning, include the use of armed force.

But in judgment of the Resolution account must be taken of the situation it is designed to meet. On the one hand the Members of the United Nations have each a political obligation under the Charter to contribute to the maintenance of peace and the suppression of acts of aggression (Article 1); on the other hand they are legally bound to one another, as contracting parties to the Charter, to observe its constitutional and other provisions for carrying out this political obligation. Where deadlock arises in the Security Council, it brings about a conflict between the political

[6] 'The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.'

[7] 'Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.'

[8] In any case Article 11 (4) deals with the powers of the Assembly and not with the stated limitations on those powers.

obligation to enforce peace and the legal obligation to observe the U.N. Constitution. How this conflict is to be resolved is a political and not a legal question. But would it not have been better to stand on Articles 51 and 106 [9] and to make provision for 'action' *through* but not *by* the General Assembly? [10] Article 106 being part of the Charter is open to none of the legal difficulties of the present Resolution; nor is it subject to the procedural complications of the Resolution and certainly to no greater political difficulties.

### *South West Africa*

The General Assembly 'accepted' the advisory opinion [1] of the International Court of Justice on the status of South West Africa; called upon South Africa 'to take the necessary steps to give effect to the opinion . . . including the transmission of reports on the administration of the territory of South West Africa and of petitions from communities or sections of the population of the territory'; and set up a Committee, composed of representatives of Syria, Thailand, United Kingdom, United States, and Uruguay, to confer with South Africa on 'the procedural measures necessary for implementing the advisory opinion', and 'to examine, in accordance with the procedure of the former Mandates system, the report on the administration . . . of South West Africa, covering the period since the last report, as well as petitions'.

The General Assembly has carefully avoided at this stage any reference to the Trusteeship Council or even to the Special Committee, treating the question of South West Africa as being sui generis and not falling to be dealt with under either Chapter XI or XII of the Charter. On the other hand, the inter-governmental committee, which is to concern itself with South Africa's administration of the territory, can hardly have the non-political character of the Permanent Mandates Commission. The report and the petitions it will examine are the sign of South Africa's accountability to the United Nations for its administration of South West Africa. The International Court was divided on the question whether, given the continuance of the Mandate after the dissolution

[9] There is nothing which precludes 'action' by Members 'on behalf of the organisation' where consultation between one of them and the remainder fails of agreement.

[10] Paragraph 8 of the Resolution, which provides that the availability of elements of each Member's armed forces for use as U.N. units shall be 'without prejudice to the use of such elements in exercise of the right of individual or collective self-defence', comes very near to this.

[1] For a discussion of this advisory opinion see this Quarterly (January, 1951), p. 78, Ellison Kahn, 'The International Court's Advisory Opinion on the International Status of South West Africa'.

of the League of Nations, South Africa was to be held accountable for administration of South West Africa to the United Nations or at all. The Court had to choose between two answers to the question, neither very satisfactory : South Africa remains accountable, in which case the question arises, to whom must she give account, and in designating the United Nations as the authority the Court did not explain very convincingly how the right of supervision of South Africa's administration was transferred from the League to the United Nations : South Africa has ceased to be accountable, in which case there is an anomaly, for whether the legal character of an international mandate is to be understood in terms of trust, agency, or mandate, accountability is common to them all. The intricate reasoning of both the majority, which adopted the first answer, and of Judges McNair and Read, who dissented on the point and chose the second, is eloquent of the dilemma. The difficulties in the majority opinion have been pointed out by Mr. Kahn; while it is not clear why, on Judge McNair's view, the duty of accountability is to be regarded as a ' personal or contractual obligation ' of South Africa terminated by the dissolution of the League, rather than a ' real obligation ' being one of the elements, or even the essential element, in South West Africa's status as a territory under a permanent international regime. However, the majority opinion being the opinion of the Court, the General Assembly adopted it and perhaps could not politically have taken any other course.

The question remains whether South Africa can, consistently with her obligations as a Member of the United Nations, challenge the correctness of the opinion on her accountability and so disregard the terms of the Resolution.

It has been said of the advisory opinions of the Permanent Court of International Justice : ' The question arises as to the force of the opinion. Is it binding upon the Council or Assembly (sc. of the League of Nations) and are the States to which it may refer under an obligation to follow it? The answer to these questions is negative as a matter of form, and affirmative as a matter of substance. It is true that the consulting body is under no legal obligation to give effect to the Court's opinion, and still less are the States concerned, which are not " technically " parties before the Court, legally bound thereby. But in fact it is impossible for the Council or Assembly, having referred a matter to the Court for its opinion, to disregard its conclusions '.[2] It is submitted that this statement is equally true of the present Court in relation to

[2] Fachiri, *Permanent Court of International Justice* (2nd ed.), p. 80.

the organs of the United Nations: thus the General Assembly is not bound to act upon an advisory opinion, in that, having, for example, received from the Court an opinion that a certain course of action was lawful, it may not follow that course at all or may circumvent legal difficulties found to lie in it or in exceptional[3] cases may act contrary to the opinion; but what it can in no circumstances do is declare or proceed on the footing that the opinion is wrong in law. The Members of the United Nations have constituted the Court its 'principal judicial organ' and must accept its opinions as authoritative in so far as they are answers to legal questions put, including the question whether a matter so put is a 'legal question'.

It may nevertheless be doubted whether it is desirable, under the advisory procedure, for judges of the Court to hand down dissenting opinions. Article 57 of the Statute of the Court permits the delivery of dissenting opinions in contentious cases while Article 68 requires the Court to be guided in the exercise of its advisory functions by such of the provisions of the Statute relating to contentious matters as it thinks applicable. A dissenting opinion under the advisory procedure will tend to give grounds for disputation in the General Assembly or other body receiving the advisory opinion and some colour of right to those Members who contest it, so enfeebling any resolution adopted to implement the opinion. Would it not be better practice for the Court to deliver only one opinion upon each of the questions put to it, this being in cases of disagreement the opinion of the majority?

### *Eritrea*

As part of its disposal under the Italian Peace Treaty of the former Italian colonies, the General Assembly adopted a Federal Act[1] for Eritrea, by which 'Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown'. The Resolution, embodying the Federal Act, has other constitutional provisions for Eritrea and makes transitional arrangements for the transfer of British administrative authority. The Federal Act has two paragraphs of some legal interest:—

Paragraph 6 provides that 'inhabitants born in Eritrea and having at least one indigenous parent or grandparent' become

[3] Only a complete change of circumstances or extreme necessity could justify this and the General Assembly should, before deciding to request an opinion, consider whether overriding political considerations may not create a conflict between the Assembly and the Court, should the Court give a particular answer to the question put.

[1] To be later ratified by the Emperor of Ethiopia on the one hand and the people of Eritrea in national assembly on the other.

Federal nationals; but those who also possess a foreign nationality may opt 'to retain that nationality', renouncing the nationality of the Federation; if they do not so opt within six months of the entry into force of the Eritrean Constitution, 'they shall thereupon lose such foreign nationality'. Since such loss of nationality can be brought about only under the applicable foreign law, this is a brutum fulmen [2]; it may perhaps be simply an assertion of the 'master nationality rule', that where there is no exercise of the option no claim of right or diplomatic protection arising out of the foreign nationality will be recognised within the Federation.

The Constitution of Eritrea is 'to include the guarantees contained in paragraph 7' which deals with civil rights and liberties. This paragraph is so badly put together that the General Assembly might almost be suspected of cynicism: the principle of non-discrimination against foreign companies and enterprises is added as a kind of gloss upon 'the right to equality before the law'; the 'right to life' is found side by side with 'a right of appeal to the Emperor for commutation of death sentences'; 'No one shall be subject to arrest or detention without an order of a competent authority, except in cases of flagrant and serious violation of the law in force' is a provision with which any authoritarian regime would be quite content; and has it not been shown in many arduous debates on human rights in the General Assembly that 'subject to the requirements of the law' (which appears three times in the paragraph) is a qualification which nullifies the right? At best these provisions can be regarded as simply as titles of Articles to be later elaborated in the Constitution, but even then the drafters will be hard put to it to make sense of them.

### *Representation of Member States*

The significant part of a resolution adopted by the General Assembly on December 14, 1950, recommends that:—

> 'whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations, and this question becomes the subject of controversy in the United Nations, it should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case;

and declares that:—

> 'the attitude adopted by the General Assembly or its Interim Committee concerning any such question shall not of itself

[2] It can hardly mean that Members of the United Nations are committed by the Resolution to legislate, where necessary, to deprive their nationals of their nationality in the given circumstances.

affect the direct relations of individual Member States with the State concerned'.

The Charter is silent upon the question how such a controversy is to be resolved. It provides that: 'Each Member shall have not more than five representatives in the General Assembly' (Article 9 (2)); and that on the Security Council and Economic and Social Council each Member shall have one representative (Articles 23 (3) and 61 (4)); while 'Each Member of the Trusteeship Council shall designate one specially qualified person to represent it therein' (Article 86 (2)). However Article 28 (1) provides that 'The Security Council shall be so organised as to be able to function continuously. Each Member of the Security Council shall for this purpose be represented at all times at the seat of the Organisation'.

Three things appear incontestable: that each Member State has the right[1] of representation in the General Assembly and in the other organs of which it is, under the Charter or by election, a member; that this right of representation can be exercised only by the government of each Member State, that is to say, only persons designated by the government may take their seats; and that where two governments in a Member State each claim to exercise the right, the United Nations must decide between them. But here the questions begin. Should each organ of the United Nations decide for itself any such issue of representation or should the General Assembly, as representing the totality of Members, settle it once and for all? In the paragraph quoted above the General Assembly makes a cautious step towards uniformity, while acknowledging the right of each organ (in some cases to be found expressed in its rules of procedure) to decide for itself. It is not clear whether 'attitude' means the taking of a decision by the General Assembly, or why the Interim Committee, which cannot of itself take any final decision on behalf of the Assembly, should be given any pre-eminence in the matter. It would have perhaps been sounder to require the other organs and specialised agencies to take into account the attitude 'of the majority of the Members of the United Nations'. But the central question is whether the right of representation depends upon recognition. On the one hand it may be said that the right should be exercised by the established government, which has effective control of the national

[1] This right may be suspended under Article 5 in case of 'a Member . . . against which preventive or enforcement action has been taken by the Security Council', or restricted (by deprivation of vote in the General Assembly) under Article 19 in case of a Member in arrears with its contributions to the budget. A Member may, of course, be expelled from the U.N. in certain circumstances under Article 6.

territory [2]; that whether one of the rival governments satisfies this condition is a question of fact, which each Member must, before casting its vote, decide without regard to its own political attitude to that government and, in particular, to whether it has recognised it or not. On the other hand it is argued that the recognition of the government of a Member State and the acceptance [3] of its representatives in U.N., as representatives of that Member, cannot be separated, since a vote in favour of acceptance is tantamount to recognition [4]; that recognition is a decision of policy, not wholly conditioned upon the facts; and that Members are free to cast their votes on the question of representation in terms of policy, even though one of the rival governments may be in fact the only effective one. Attempts have been made to establish a middle position, in which the right of representation would be distinguished from recognition but would be made to depend not only upon the facts (effective control) but also upon the likelihood of the claimant government fulfilling its Charter obligations; the acceptance of representatives would thus be analogous to the admission of new Members and there would be a wide margin of political appreciation. Only the first view seems defensible; the others lend to political embarrassment and injustice.

The General Assembly resolution quoted above is far from offering a solution. 'The Purposes and Principles of the Charter', which it invokes, give no guidance though Article 2 (1) would appear to favour the first view; while a determination upon 'the circumstances of each case' might be based on any view. China has at present no effective representation in the principal organs of the U.N. and Article 2 (1) is to that extent broken; it seems also that the mandatory provisions of Article 28 (1) are being disregarded. On December 12, 1950, the General Assembly set up a committee of seven Members to examine the question of China's representation: it has not so far reported.

### *Continuation in Office of the Secretary General*

The Security Council was unable to agree on a recommendation to the General Assembly for the appointment of a Secretary General,[1]

[2] Since only that government can carry out the Member's Charter obligations.

[3] That is, by affirmative vote. A Member may, of course, permit its representatives to sit in U.N. bodies with representatives of Members, the governments of which it does not recognise, without being in any way committed to recognition.

[4] Compare the view taken by Canada that its vote cast in the Security Council to recommend the admission of Israel to the U.N. *was* recognition and that no other formal step was necessary.

[1] See U.N. Charter, Article 97: 'The secretariat shall comprise a Secretary General and such staff as the Organisation may require. The Secretary

and again precipitated the question what the Asssembly can and should do when there is deadlock in the Council. The Assembly

'*Considering* the necessity to ensure the uninterrupted exercise of the functions vested by the Charter in the office of the Secretary General,

*Considering* that the Security Council recommended to the first regular session of the General Assembly the appointment of Mr. Trygve Lie as Secretary General and that, on February 1, 1946, the General Assembly appointed Mr. Trygve Lie as Secretary General for a five-year term'

decided that he should 'be continued in office for a period of three years'.[2]

At first sight there appear to be two constitutional difficulties in this decision by the Assembly; in the first place, Article 97 requires a positive recommendation by the Security Council, similar to that required for the admission of a new Member to the United Nations under Article 4 (2).[3] Secondly, the General Assembly expressly adopted in February, 1946, the proposal of the Preparatory Commission of the United Nations that any renewal of appointment of the Secretary General should be made by the same process as his first appointment, that is to say, upon recommendation of the Security Council.[4] It seems impossible, in view of this, to argue that the Security Council's recommendation of the present Secretary General in January, 1946, still stands, so as by itself to support renewal of his appointment; though granted that the Assembly can reverse itself and ignore a previous resolution, the Security Council must have had notice of the resolution of February, 1946, and be deemed to have recommended Mr. Lie for appointment on the understanding that it would be able to decide at the proper time whether or not to recommend his renewal. Technically it did not recommend his renewal, and could agree on no other candidate. In this situation, obviously not contemplated by the Charter or by the United Nations in 1946, the Assembly's action may perhaps be justified in the following way: Article 4 (2) and Article 97 are to be distinguished and the interpretation of the first by the

General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organisation'.

2 Resolution A/1475 of November 1, 1950.

3 The International Court held, in its second advisory opinion on the Admission of New Members, that the Assembly cannot properly proceed under Article 4 (2) unless the Security Council has made a recommendation; and that, where an application for admission does not secure a majority of votes upon the Council or where the recommendation of the majority is defeated by the negative vote of a permanent Member, there is no 'recommendation' for the purposes of Article 4 (2).

4 See *United Nations Yearbook, 1946–7*, s.v. Secretary General.

International Court is not necessarily to be applied to the similar language of the second; in particular, it is not *essential* to admit new Members to the Organisation but it is essential to have a Secretary General and the Charter makes his appointment mandatory. It is arguable therefore that, under Article 97, where the Security Council makes a particular recommendation the Assembly must appoint the person so recommended,[5] but where the Council fails, for any reason, to make a recommendation, the Assembly can and indeed must make its own appointment. In short, 'recommendation' means 'prior approval' in Article 4 (2) and 'suggestion' in Article 97.

### *Human Rights Covenant*

The General Assembly[6] sent back the draft Covenant, prepared by the Human Rights Commission at its 1949 and 1950 sessions, for revision, the revised draft to be laid before the Assembly at its sixth session in 1951. The Assembly criticised the present draft in very broad language: that it did not contain 'certain of the most elementary rights'; and that the wording of the first eighteen Articles 'should be improved in order to protect more effectively the rights to which they refer'. The Assembly also decided to include economic, social and cultural rights in the draft Covenant; and to instruct the Human Rights Commission to consider 'provisions to be inserted in the draft Covenant or in separate protocols for the receipt and examination of petitions from individuals and organisations with respect to alleged violations of the International Covenant of Human Rights'. Thus two issues which had divided the Commission are in principle settled, though the Assembly's decisions may well in effect widen the areas of disagreement on the Commission.

On one specifically legal aspect of the draft Covenant the Assembly took a radical decision, that is to say, on its territorial application. It requested the Commission to include the following Article in the Covenant:—

> 'The provisions of the present Covenant shall extend to or be applicable equally to a signatory metropolitan state and to all the territories, be they non-self-governing, trust, or colonial territories, which are being administered or governed by such metropolitan state.'

[5] The view that a 'recommendation of the Security Council' is not under Article 97 a condition sine qua non of appointment by the Assembly receives further support from the fact that there is nothing in the language of the Article to prevent the Council from recommending two or more names to the Assembly.

[6] See Resolution A/1599 of December 4, 1950.

The Assembly also instructed the Commission 'to study a federal state article and to prepare . . . recommendations which will have as their purpose securing the maximum extension of the Covenant to the constituent units of federal states, and meeting the constitutional problems of federal states'.

The proposed Article and the instruction, execrably drafted, are designed to solve the problem of the colonial and federal application of international agreements, which has vexed United Nations debates for a long time.[7] The Article, if incorporated in the Covenant, will place great political and constitutional difficulties in the way of the United Kingdom's acceptance of the Covenant; and it is not easy to see why federal states are, in the instruction, more tenderly handled, and their 'constitutional problems', which are analogous to those of a State having colonies, to be given consideration. Is it because the most influential member of the United Nations is a federal State?

### *Freedom of Information*

A new draft Convention has been completed by the committee of fifteen Members of U.N. appointed by the General Assembly in December last.[8] The draft is based largely on that originally prepared by the Freedom of Information Conference held at Geneva in March—April, 1948, and already considered by the General Assembly at its Fourth Session.

The convention defines the rights of individuals to receive and impart information and opinions without regard to national frontiers and without governmental interference; however, the exercise of these rights is made subject to a number of express limitations.

### *Genocide*

The Genocide Convention entered into force on January 12, 1951. The following countries have ratified or acceded to it and are therefore contracting parties: Australia, Ecuador, El Salvador,

[7] See generally 'Treaty relations of British overseas territories', *B.Y.B.I.L.* (1949), p. 86, and particularly pp. 105–107.

[8] A/1630. The Assembly's directions on this subject are of interest in that it abandoned the bad practice of passing draft conventions through all the stages of General Assembly debate, which not only exposed them to wholly extraneous political influences but was futile in that at the end the Assembly, not being a legislature, could do no more than recommend the draft convention to governments for acceptance. The resolution instead directed the Secretary General to submit the committee's draft to governments for their observations, and the Economic and Social Council to call an intergovernmental conference to finalise the draft convention, if it considers, in the light of those observations and generally, that there are chances of a convention emerging.

Ethiopia, France, Guatemala, Haiti, Iceland, Israel, Liberia, Norway, Panama, Philippines (with reservations concerning Articles IV, VI, VII and IX), Yugoslavia (Ratifications); Bulgaria (with reservations regarding Articles IX and XIII),[9] Cambodia, Ceylon, Costa Rica, Jordan, Korea, Monaco, Saudi Arabia, Turkey, Viet Nam, Rumania, Poland, Laos (Accessions).

*Reservations to Multilateral Conventions*

Certain reservations to the Genocide Convention have been objected to by some States; for example, Bulgaria had acceded to the Convention with purported reservations to the territorial application clause and to the settlement of disputes clause.[10] The Secretary General, whose task it was under the Convention to act as depositary of ratifications and accessions, reported on the matter to the General Assembly and sought its guidance. The Assembly, faced with divergent views in the Sixth (Legal) Committee on the effect of reservations and on the rights of signatory States where reservations to a convention by one or more of their number are made, requested the International Court to give an advisory opinion upon the following questions:—

'In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:

I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

II. If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and:

(a) the parties which object to the reservation?

(b) those which accept it?

III. What would be the legal effect as regards the answer to Question I if an objection to a reservation is made:

(a) by a signatory which has not yet ratified?

(b) by a State entitled to sign or accede but which has not yet done so?'

[9] See next note.

[10] The 'reservation' in respect of the territorial application clause was not a reservation in the proper sense at all but a criticism of the form of the clause. The reservation in respect of settlement of disputes struck at the root of the convention, since it was in effect a rejection of the modes of settlement therein provided, so as to render the convention unenforceable against the reserving State.

The Assembly also invited the International Law Commission, in the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law.

*International Criminal Court*

Acting upon Part IV of the second report of the International Law Commission and upon Article VI of the Genocide Convention, the Assembly has established a committee of seventeen [11] Members of U.N. which is to meet in Geneva on August 1, 1951, 'for the purpose of preparing one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court'.

The Assembly has also invited the governments of Members of U.N. to furnish their observations on the Nuremberg Principles formulated by the International Law Commission in its second report.

*International Penal and Penitentiary Commission*

The functions of this long-established body, together with its library and archives, are to be transferred to the United Nations not later than December 31, 1951.

## International Court of Justice

*Right of Asylum Case (Colombia/Peru) I.C.J. Reports 1950*, p. 266

A military rebellion broke out in Peru on October 3, 1948, and was suppressed the same day. On October 4, the President of Peru issued a decree charging the American People's Revolutionary Alliance with having organised and directed the rebellion, and placing it outside the law. The Party was forbidden to exercise any form of activity and it was announced by the decree that its leaders would be brought to justice in the national courts as instigators of the rebellion.

On October 5 the Ministry of the Interior denounced Víctor Raúl Haya de la Torre, the leader of the American People's Revolutionary Party, and other members of the Party as responsible for the rebellion. On the 10th the Public Prosecutor announced that they would be proceeded against for the crime of military rebellion.

[11] Australia, Brazil, China, Cuba, Denmark, Egypt, France, India, Iran, Israel, Netherlands, Pakistan, Peru, Syria, United Kingdom, United States and Uruguay.

The next day the Examining Magistrate announced the opening of proceedings against Haya de la Torre and others on this charge, and on the 27th ordered the arrest of those of the accused who had not yet been detained. A *coup d'état* was effected by a military junta which seized supreme power on the 27th. A week later, on November 4, the junta issued a decree providing for courts martial by summary procedure in cases of rebellion, sedition and rioting, fixing short time-limits and severe punishment without appeal. This decree, however, did not apply to the judicial proceedings against Haya de la Torre and the others, which continued under the same law as before.

Haya de la Torre was not arrested as he could not be found, and on January 3, 1949, he sought asylum in the Colombian Embassy in Lima. Acting in accordance with Article 2 of the Havana Convention on Asylum, 1928,[1] to which both States were parties, the Colombian Ambassador informed the Peruvian Foreign Minister that he had accorded asylum to Haya de la Torre and requested that a safe conduct be issued in his behalf. By Article 2 asylum may only be granted to political offenders, and only 'in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety'. In view of this the Ambassador sent a further note informing the Minister that 'the Government of Colombia, in accordance with the right conferred upon it by Article 2 of the Convention . . . has qualified' de la Torre as a political refugee.

The Peruvian authorities contested the Colombian right to grant asylum and the matter was referred to the International Court of Justice. Colombia called upon the Court to declare 'That the Republic of Colombia, as the country granting asylum, is competent to qualify the offence for the purpose of the said asylum, within the limits of the obligations resulting in particular from the Bolivarian Agreement on Extradition of July 18, 1911,[2] and the Havana Convention on Asylum of February 20, 1928, and of American international law. That the Republic of Peru, as the territorial State, is bound in the case now before the Court to give the guarantees necessary for the departure of M. Víctor Raúl de la Torre from the country, with due regard to the inviolability of his person'. By way of counter-claim, Peru sought a declaration that the grant of asylum was contrary to Article 1 of the 1928 Convention—'It is not permissible for States to grant asylum

[1] 4 Hudson, *International Legislation*, p. 2412.
[2] *Tratados, Convenciones y Acuerdos, Vigentes entre el Peru y otros Estados*, published by the Ministerio de Relaciones Exteriores del Peru, Vol. 2, 1936, p. 162.

in legations, warships, military camps or military aircraft, to persons accused or condemned for common crimes, or to deserters from the army or navy '—as well as of Article 2 of that Convention. It was also alleged that the maintenance of the asylum constituted a further violation of the Treaty.

As there was no judge of the nationality of either of the parties on the bench, both took advantage of the provisions of Article 31 of the Court's Statute and designated judges *ad hoc* for the hearing. The Court, by fourteen votes to two, rejected the first Colombian submission, and the second by fifteen to one. It also, by fifteen to one, rejected the counter-claim in so far as it was based on a violation of Article 1, but found, by ten votes to six, that the grant was not in accordance with Article 2 of the Convention.

The Colombian reference to the Bolivarian Agreement shows the danger of generalising and using analogies in international law. Article 18 of that Agreement provides: 'Aside from the stipulations of the present Agreement, the signatory States recognise the institution of asylum in conformity with the principles of international law'. From this Colombia attempted to maintain that international law recognised a general right of asylum with the protecting State possessing full power to qualify the nature of the offence. The Court first pointed out that while the protecting diplomatic representative undoubtedly possessed a provisional right to qualify, this could not deprive the territorial State of its right to contest the qualification. This finding is in accordance with the rule of international law that restrictions on sovereignty are not to be implied, but must be expressed, and, as the Court pointed out, Article 18 merely referred to the 'principles of international law', which 'do not recognise any rule of unilateral and definitive qualification by the State granting diplomatic asylum'.

Having dealt thus shortly with this point the Court proceeded to consider the confusion evident in the Colombian contentions between territorial and diplomatic asylum. It should be borne in mind that, in the absence of treaty, there is no right to obtain the extradition of an accused person. Any such non-treaty surrender would be purely discretionary, and would involve a voluntary waiver of its jurisdiction by the extraditing State. In diplomatic asylum, on the other hand, what is involved is an extension of jurisdiction by the State whose diplomatic representative wishes to confer asylum. In the words of the Court: 'In the case of extradition, the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory where the offence was committed, and a decision

to grant him asylum in no way derogates from the sovereignty of that State.

'In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case.

'For these reasons, it is not possible to deduce from the provisions of agreements concerning extradition any conclusion which would apply to the question now under consideration.'

The Court also considered how far the Havana Convention implied a unilateral competence to the State granting asylum to qualify the nature of the asylum, and again pointed out that such a competence would involve 'a derogation from the equal rights of qualification which, in the absence of any contrary rule, must be attributed to each of the States concerned', and would thus aggravate the derogation from sovereignty already involved by the grant of asylum. Further, the Court did not think such a competence to be essential to the exercise of asylum. A further attempt to derogate from Peruvian sovereignty and to interfere with the domestic jurisdiction of Peru was made by Colombia when it alleged that the provisions and definitions of Colombian law with regard to the qualification of offences should be applied against Peru, so that if an offence were regarded as political by Colombian law it should be so regarded by Peru. This contention received short shrift from the Court.

Despite the fact that two Latin-American countries were involved in this dispute, the Court did not pay great attention to the Colombian invocation of 'American international law in general'. It was pointed out that Colombia would have to prove, in accordance with Article 38 of the Court's Statute, that any such 'custom is established in such a manner that it has become binding on' Peru. The Court did not consider that the evidence brought forward by Colombia was sufficient to prove the existence of a custom allowing unilateral definitive qualification of the offence for which asylum had been afforded. Having held that there was no such custom, the Court then considered what Peru's position would have been had such a custom existed. It pointed out that the Convention on Political Asylum and the Treaty on Political Asylum and

Refuge signed at Montivedeo in 1933 [3] and 1939 [4] respectively were the first to include any rules concerning the qualification of offences in connection with asylum. Since Peru has expressly refused to ratify either of these documents it would be impossible to hold her bound by proposals which first appear in such documents.

As regards the contention that Peru was obliged to give guarantees in respect of Haya de la Torre's departure, the Court pointed out that this could only be true if the asylum were properly afforded, and by the Havana Convention this would only be so if granted to political offenders not accused or condemned for common crimes, and only in urgent cases and for the time absolutely essential for the safety of the refugee. Further, Article 2 also stipulates that 'the Government of the State may require that the refugee be sent out of the national territory within the shortest time possible; and the diplomatic agent of the country who has granted asylum may in turn require the guarantees necessary . . .'. The order of the words used and the employment of the phrase 'in turn' led the Court to construe this Article as meaning that the territorial State possesses a discretion concerning the departure of the refugee, and only in the event of the exercise of this discretion could the diplomat request a safe-conduct. In the present case, the Peruvian Government did not demand Haya de la Torre's removal; in fact it contested the asylum.

It is submitted that while it may be true that the territorial State possesses a discretion as to the removal of the refugee, it is a denial of the whole purpose of asylum to give the State the power to prevent his removal in safety. The function of asylum is to give protection to a fugitive, and in the Havana Convention provision is made for the protection of political fugitive offenders. In a country where political temper runs high, it may often be the case that such protection can only be adequately given if the refugee is enabled to leave the country. It is suggested that the purpose of the Convention was to ensure just this, and had the Court adopted a functional rather than a literal and grammatical interpretation its attitude to this Article would probably have been different. It is true that such an interpretation might well result in the removal of an offender who is not in fact a political offender, but it would probably be more in accordance with the demands of justice if the territorial State had to request the return of such an individual, rather than that it should be in a position in which it could deny the safe removal of a true political opponent. In fact, since the Court found that there was no ground for the

[3] 6 Hudson, *International Legislation*, p. 607.
[4] 8 *Ibid.*, p. 404.

Colombian Ambassador to extend asylum the instant interpretation was of no significance.

When it came to consider the counter-claim the Court pointed out that the onus of proving that Haya de la Torre was a common criminal rested upon Peru. The Court did not feel that military rebellion, the offence with which he was charged, in itself constituted a common crime, particularly as the Peruvian Code of Military Justice made provision for common crimes committed during or in connection with a rebellion. For these reasons this element of the counter-claim was dismissed.

It was next incumbent upon the Court to look to the urgency of the grant of asylum, for by Article 2 of the Havana Convention it may only be granted to political offenders 'in urgent cases', 'the essential justification for asylum being in the imminence or persistence of a danger for the person of the refugee'. On this point, the onus of proof was upon Colombia. Neither side denied the legitimacy of asylum against mob violence, but Haya de la Torre was in no such danger, for he did not take refuge until three months after the rebellion. Apparently the sole danger from which he sought to escape was prosecution, and 'in principle, it is inconceivable that the Havana Convention could have intended the term "urgent cases" to include the danger of regular prosecution to which the citizens of any country lay themselves open by attacking the institutions of that country. . . . Asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law'. The Court held that Colombia had failed to discharge its burden.

In this regard too, reference was made to Latin-American practice: 'The Court cannot admit that States signatory to the Havana Convention intended to substitute for the practice of the Latin-American Republics, in which considerations of courtesy, good-neighbourliness and political expediency have always held a prominent place, a legal system which would guarantee to their own nationals accused of political offences the privilege of evading national jurisdiction. Such a conception, moreover, would come into conflict with one of the most firmly established traditions of Latin-America, namely, non-intervention. It was at the Sixth Pan-American Conference of 1928, during which the Convention on Asylum was signed, that the States of Latin-America declared their resolute opposition to any foreign political intervention. It would be difficult to conceive that these same States had consented, at the very same moment, to submit to intervention in its least acceptable form, one which implies foreign interference in the

administration of domestic justice and which could not manifest itself without casting some doubt on the impartiality of that justice'. With reference to the various precedents that were cited as evidence of a legally binding custom requiring the territorial State to recognise the validity of an asylum exercised against judicial proceedings, the Court pointed out that political considerations had played an important role in all of these cases, in fact 'asylum as practised in Latin-America is an institution which, to a very great extent, owes its development to extra-legal factors'.

Although the Court found that there was no justification for the grant of asylum, it placed no blame upon the Colombian Ambassador. Since it regarded asylum as a continuing phenomenon which persisted so long as the refugee remained in the diplomatic building, the Court considered superfluous the Peruvian request for a condemnation of the maintenance of the asylum. It was sufficient to hold that the extension of the asylum constituted a violation of the Treaty.

It is perhaps not surprising that the *Asylum Case* produced a number of dissenting opinions. As has become customary in the activities of the International Court of Justice, Judge Alvarez delivered a lengthy dissenting judgment in which he referred to the 'new regime of interdependence, which is now emerging'. Although he felt that this must result in important changes he did not feel it necessary to consider them in the instant case. He drew attention to the historical need of asylum in Latin-America, and regarded it as a well-established principle of 'Latin-American international law'. He pointed out that the expression 'American international law' does not mean 'an international law which is peculiar to the New World and entirely distinct from universal international law, but rather the complex of principles, conventions, customs, practices, institutions and doctrines which are peculiar to the Republics of the New World. . . . If certain precepts, which are held to be universal, are not accepted by the countries of the American continent, it is obvious that they no longer have that character; and if American precepts are not recognised by the countries of other continents, they must be applied only in the New World'. This definition of American international law may well be true, and one may even accept Judge Alvarez' statement that not all the Latin-American States need accept these principles. Such dissidents would presumably still be bound by the ordinary rules of international law. Where one may be inclined to disagree with the learned judge is when he suggests that the American States can unilaterally renounce 'precepts . . . held to be universal'. It is submitted that such a

renunciation would require recognition by the non-American world before it could be applied against States from other continents. For this reason, and because of the doctrine *res inter alios acta*, it is felt that there is no foundation for his assertion that American international law ' is also binding upon the States of other continents in matters affecting America '. Judge Alvarez regionalises international law still further. Not only is there American international law, but there is also Latin-American international law which is not accepted by the United States, European international law, a developing Asiatic international law, and an emergent Soviet international law. Such sub-dividing of international law would soon result in a situation which knew no international law, in which each country or *bloc* would be able to assert that it recognised only its own international law, and in matters affecting it only its system of international law could apply. In fact, instead of creating inter-dependence, what would be created is international anarchy. Judge Alvarez was on stronger ground when he pointed out the danger of leaving the territorial State to define the political nature of the offence, for States invariably define as common crimes such offences as military rebellion. He would like to see the matter of definition left to an international legal authority. Having said this, he has once again lost himself in the ramifications of the new international law.

Another judge who was concerned with the nature of ' American international law ' was Judge Read, a national of Canada which may in certain circumstances find itself adversely affected by strange concepts of American international law. He regards it as ' a body of conventional and customary law, complementary to universal international law, and governing inter-State relations in the Pan-American world '. He indicated that the American States, even before the first conventional regulation of 1899, recognised a right of diplomatic asylum for political offenders, a right the exercise of which could only be countered by diplomatic pressure. Judge Read then examined the nature of asylum in order to ascertain the intention of the parties signatory to the Havana Convention, and to discover whether in fact urgency merely related to mob violence. He pointed out that prior to 1928 no political offender who had been afforded asylum had been surrendered to the territorial State. In his opinion to exclude ' political disturbance ' in the widest sense would be to revise and not to interpret the Convention.

Applying a functional interpretation Judge Read pointed out that ' a political offender is a person who has committed a political offence against the laws of the territorial State. Asylum cannot,

by its very nature, be granted to a political offender without protecting him from local prosecution, and without frustrating the administration of justice in the territorial State '. As he remarked, to limit political asylum merely to protect a person threatened by the mob would be to place the political offender in the same position as a common criminal to whom such humanitarian asylum is also permissible. Such an interpretation, he maintained, would be tantamount to a negation of the Convention. This interpretation of the 1928 Treaty was supported by the practice of Colombia and Peru, as well as other Latin-American countries, between the coming into force of the Treaty and the Haya de la Torre incident, and even in this case the grant of asylum to many of his fellow-revolutionaries was recognised, and safe-conducts issued on their behalf. One limitation introduced by the learned judge upon the grant of asylum lay in his restriction of its exercise to periods of political disturbance of a revolutionary character. He did not consider asylum possible in times of tranquility.

Another dissenting judge who was aware of the dangers of a strictly grammatical interpretation was Judge Azevedo, who warned against disregarding ' the manner in which a legal institution has become adapted to the social conditions existing in a certain part of the world '. The significance of this statement lies in its recognition of the fact that international law, like any other system of law, is not a sterile but a virile system. It would be advantageous if more ' politico-lawyers ' remembered this, for too often they adopt an attitude that a situation is *sui generis* requiring law to be made *de novo*. Usually, it is comparatively easy to apply and adapt the existing law. His application of historical reasoning is probably best seen when he compares asylum in Europe and in Latin America : ' In Europe, where social changes are rare but serious, the institution of asylum tends to disappear; in Latin-America, however, where revolutions are less serious but much more frequent, the adaptation and development of this ancient practice has progressed, gaining force with each convention signed, and it is still not yet possible to foresee the high point, much less the low point, of the curve '.

It is perhaps not surprising that the Brazilian judge was interested in ascertaining whether a custom with regard to asylum existed in Latin-America. His concern was whether the interruptions that had been cited were exceptions or breaches, or truly indicated that no custom existed. In his opinion ' these exceptions are only the result of personal attitudes and rather reflect the conduct of governments in defiance of the juridical conscience of States which had previously been firmly established. Such transitory or

episodic reactions are always the counterpart of political situations in the process of consolidation and rarely arise from the normal functioning of constitutional organs. . . . These occasional denials constitute violations of an already established rule, for a State cannot oppose a custom already accepted '. In his opinion nothing less than clear unequivocal denial would be sufficient, and he instanced the examples of the United States which has consistently lodged reservations to Pan-American Conventions providing for diplomatic asylum, and has always refused to acknowledge any customary rule to this effect as binding upon herself.

Judge Azevedo was not terribly impressed by the Court's consideration for national sovereignty in connection with asylum in Latin-America, particularly where the granting State was also one of the Republics, for in their history asylum and safe-conducts have constantly been requested and granted, without any accusations of unwarranted interference. He did not think, however, that the protecting ambassador was entitled as of right to receive such a safe-conduct. Having analysed the law and the facts in no small detail Judge Azevedo came to the conclusion that both the claim and the counter-claim should be dismissed, for he did not consider that the parties had furnished sufficient material for the Court to reach an independent decision.

On the day that the Court delivered its judgment Colombia requested, in accordance with Article 60 of the Court's Statute, an interpretation of the judgment, alleging that there were certain gaps which made it difficult to observe. It was suggested, for example, that it was not made clear whether Colombia was under any obligation to restore Haya de la Torre to the Peruvian authorities, and whether it would be necessary to do so even without receiving a request from those authorities. The Court, by twelve votes to one, agreed with the Peruvian contention that the questions now raised by Colombia did not relate to interpretation of the judgment, but were in fact new questions which had not previously been put to the Court, and on which, therefore, the Court was unable to deliver an interpretative judgment. It ruled quite simply that the request for interpretation was inadmissible.

This is one of those judgments in which some of the dissenting opinions tend to be more useful than the majority decision. The majority, it is submitted, took too narrow and legalistic a view of the Havana Convention and paid too little attention to the purpose of asylum and the functions of the Treaty in connection therewith. Those judges who adopted a functional approach seem to arrive at a much more reasonable decision, for there appears to be little value in the whole institution of asylum if it cannot

be maintained against an ordinary prosecution, and if safe-conducts are possible only if the territorial State demands the expatriation of the refugee, in which case there would often be no need for a safe-conduct anyway. Furthermore, it is felt that too little attention was paid by the majority to the whole problem of Latin-American international law, for asylum has a special role and a special history in that part of the world. Here, Judges Alvarez, Read and Azevedo were far more reasonable than the Court. The attitude of the majority reminds one of the situation that arises whenever a lawyer or judge feels that because of his ordinary legal qualifications he is fully competent to deal with any problem of international law. A European cannot always see matters in a Latin-American fashion, and the danger is that the States of Latin-America will not again resort to the Court.

L. C. Green.

## Public and Private International Law

### Australia

### *Recent Decisions on Private International Law*
### *Testator's Family Maintenance Legislation*

Restrictions upon testamentary powers of disposition fall into two groups. On the one hand, certain legal systems, with roots in Roman law antecedents ensure to various relatives a fixed share or *portio legitima* of the testator's estate, while other countries have adopted the indirect method of empowering the courts in their discretion to make maintenance orders and in certain cases to provide capital payments in favour of dependants who have not been adequately or properly provided for. The latter solution was pioneered in New Zealand by the Testator's Family Maintenance Act, 1900, and has become a common feature of the law of succession in the principal common law jurisdictions of the British Commonwealth. England finally joined this group with the passing of the Inheritance (Family Provisions) Act, 1938, while Scotland continued to adhere to the compulsory share system.

The main feature of distinction, for the present purpose, between the English Act and the corresponding legislation in the Dominions is found in the presence of an express conflict of laws clause in the former statute, limiting jurisdiction to orders in respect of estates of English domiciliaries. This provision has been rightly subjected to much trenchant criticism [1] for selecting a

[1] *E.g.*, J. H. C. Morris, 62 L.Q.R. 178–9; Dicey, p. 550; Kahn-Freund, *Annual Survey of English Law*, 1938, p. 362.

criterion which fairly cuts across the accredited conflict rules of the law of succession that would otherwise no doubt have commended themselves to the courts for adoption. It is principally open to objection on two grounds, in that (1) it leaves a hiatus as regards immovables situate in England belonging to the estate of a testator domiciled outside the jurisdiction, because neither the English courts are empowered by domestic legislation nor foreign tribunals are jurisdictionally competent to make an order affecting them,[2] and (2) it appears to permit declarations in respect of foreign immovables, provided the deceased had died domiciled in England. This second conclusion, though not expressly adverted to by Dr. Morris, seems to accord with the view expressed by Dr. Kahn-Freund that the Act 'does not apply to English land forming part of the estate of a testator domiciled abroad, while it does apply to proceeds of foreign land belonging to the estate of a domiciled Englishman'.[3] It is based on the consideration that the statute ignores, and thereby seemingly rejects, the distinction between movables and immovables, and, by expressly selecting the testator's domicile as *the* applicable criterion, according to the ordinary canons of statutory construction, inferentially excludes further reference to general conflict rules. Thus, the adoption of the domiciliary connecting factor produces not only an unduly restrictive result in some cases, but in others an unjustifiable extension of jurisdiction in disregard of one of the most cardinal conflict rules which refers the determination of all questions relating to title, etc., of land to the *lex situs*.

In contrast, the relevant statutes of New Zealand, the Australian States and Canadian Provinces, with the exception of the ill-conceived section 2 of the Ontario Dependants' Relief Act, 1937,[4] have left it to the courts to work out the appropriate rules in accordance with general principles. The analogy to compulsory share provisions of Continental systems[5] made inevitable the characterisation of the question arising under this legislation as one of essential or intrinsic validity of testamentary dispositions, with the result that an almost uniform course of authority has been established based on the following propositions[6]:

(1) The courts of the domicile alone can exercise jurisdiction in respect of movables, but may do so wherever these are situate,

[2] *Ibid.*
[3] *Op. cit.*, p. 362, cited by Falconbridge, *Essays*, p. 576.
[4] See Falconbridge, *op. cit.*, Chap. 36.
[5] Cf. *Re Ross* [1930] 1 Ch. 377.
[6] The following decisions are those of Australia and N.Z. For corresponding Canadian authorities see *Dicey*, 6th ed., p. 550, n. 17, p. 829, n. 57, and Falconbridge, *op. cit.*

*i.e.*, whether inside or outside the forum: *Pain* v. *Holt* (N.S.W.),[7] *Re Osborne* (Queensland),[8] *Re Sellar* (N.S.W.),[9] *Re Roper* (N.Z.).[10]

(2) The courts of the situs alone can exercise jurisdiction in respect of immovables, but may do so despite the foreign domicile of the testator: *Re Butchart* (N.Z.)[11]; consequentially, the domiciliary courts as such are incompetent to bind foreign land: *Re Donelly* (N.S.W.).[12]

(3) The domicile and residence of the applicant are immaterial: *Re Found* (S.A.),[13] *Re Donelly* (*supra*).

(4) Jurisdiction is not conferred merely by the fact that probate or letters of administration *cum testamento annexo* have been granted as regards the estate (which normally would depend on the presence of assets within the jurisdiction): see *Pain* v. *Holt* (*supra*). The opposite view taken by Murray C.J. in *Re Found* (*supra*) has been described as running counter to the general practice, although the actual decision in that case was unexceptionable as the learned judge was prepared to hold that the deceased was in fact domiciled within the forum and the whole estate was situate there.

The inadequately reported decision in *Re Stewart* (Queensland)[14] alone suggests the power of domiciliary courts to affect foreign immovables. This proposition, however, has now been emphatically repudiated in an exhaustive judgment by Scholl J. in *Re Paulin*,[15] on apparently the first occasion in which the Victorian Supreme Court has pronounced on these issues.

The valuable judgment, for reasons which will appear presently, reopens for consideration the extent, and more particularly the limitation upon the frequently emphasised analogy between restrictions on the power of testamentary dispositions to a *fixed* proportion of the testator's estate and the *discretionary* jurisdiction of the common law type now under review. In the first place, Dr. Morris has advanced the view that, while 'in the former case no practical difficulties prevent any court from declaring once and for all what the rights of the parties are' irrespectively of the situs of the movables, 'in the latter case it seems most unlikely that any court would make an order the supervision of which it had

7 (1919) 19 S.R. 105.
8 [1928] St.R. 129.
9 (1925) 25 S.R. 540.
10 [1927] N.Z.L.R. 731.
11 [1932] N.Z.L.R. 125.
12 (1927) 28 S.R. 34.
13 [1924] S.A.S.R. 236.
14 [1948] Q.W.N., No. 11.
15 [1950] V.L.R. 462.

no power to control, and therefore as a matter of practical convenience would confine its orders to property within the jurisdiction'.[16] Indeed, the Canadian and New Zealand decisions which he cites as examples of the practice in the Dominion law districts do not include cases where a court has made an order in respect of movables situate outside the forum; but if intended to convey the impression that jurisdiction in those circumstances is both disclaimed and improper, the statement neither corresponds to the actual position nor, in my submission, should it be acquiesced in without challenge. As regards authority, in *Re Sellar*,[17] Long-Innes J. made an order affecting movable assets in England and the United States, being part of the estate of a testator who had died domiciled in New South Wales. He was not, however, prepared without further reflection to accept the wider submission that the same decision would have followed as of course if the deceased had left no property at all within the State. The comment is permissible that the learned judge's anxiety on the latter point was in reality unwarranted since surely, as a matter of principle, the extent of his jurisdictional authority could not, in these circumstances, be circumscribed by this extraneous factor. Accordingly, the postulate of unqualified domiciliary jurisdiction over movables wherever situate has not been doubted in subsequent cases and was specifically endorsed by Scholl J. in *Re Paulin*.[18] As regards the merits of this matter, it it difficult to see why the discretionary character of this type of jurisdiction combined with the power of varying orders should restrict the forum's competence. Lack of control and supervision are hardly relevant factors once it is agreed that the issue in question is not one of administration but of intrinsic validity of testamentary dispositions, *i.e.*, cannot be left to the law of a fortuitous forum selected at will by the applicant but is within the sole competence of the domiciliary law. Again, liability to variation may affect the extra-territorial enforcement of such orders but ought not to impinge upon jurisdictional power. Most importantly, however, the adoption of Dr. Morris's counsel would create a deplorable hiatus and thus justify the very strictures which the learned author has so pertinently unleashed against the restrictive 'choice of law' clause in the English Act with reference to immovables.

The difference as regards the method employed by the two basic systems in effecting a limitation of testamentary liberty does in truth reflect itself in the appropriate conflict rules, though I would

[16] 62 L.Q.R. at p. 178.
[17] (1925) 25 S.R. 540.
[18] [1950] V.L.R. 462, 465: proposition (2).

suggest in a different sense from that adumbrated above. It would appear to follow from the discretionary character of the jurisdiction under the Family Maintenance Acts that the conflict of laws problem is confined solely to the issue of jurisdiction, somewhat in analogy to divorce and judicial separation, whereas the question arising from compulsory share provisions is primarily one of choice of law. In the latter case, there is no conceivable reason in principle for confining adjudication to the forum of the domicile (as regards movables), since relevant provisions are pre-emptive and the *portio legitima* pre-determined; thus instances are not wanting of English courts rendering decisions in respect of the estate of foreign domiciliaries.[19] Under the Commonwealth legislation, however, it is clear that the courts are invested with a discretion which is exclusive and does not permit of exercise by a foreign tribunal on their behalf. Therefore, as regards movables, the very nature of the proceedings militates against the assumption of jurisdiction by courts other than those of the deceased's domicile.

This observation applies with equal cogency to the nexus between the *lex situs* and immovables. Indeed, it might be thought that a contrary solution would founder *in limine* by reason of the rule that only the courts of the situs have jurisdiction in respect of title to land. But, as Dr. Morris has convincingly demonstrated, the proposition as thus formulated without qualification does not accurately represent the course of English decisions because the courts have, without giving the matter much attention, evolved a practice of assuming jurisdiction over land situate abroad, at all events where they are administering an estate or trust and the property includes movables or immovables within the forum and foreign immovables.[20] Armed with this argument, the applicant widow in *Re Paulin* contended for the application or extension of this principle to the exercise of dependants' relief jurisdiction over New South Wales land. Without throwing doubt on the propriety of the principle extracted by Dr. Morris, Scholl J. unhesitatingly repudiated its applicability to the case under review. In his words, 'it may well be that in a suitable case the Victorian court may be called upon to make a declaration as to the plaintiff's right to the *jus relictæ* according to Scottish law. . . . But I cannot exercise the jurisdiction or the discretion of the New South Wales court which the *lex situs* selects as the appropriate and the only appropriate tribunal; I have no means of substituting my discretion for its discretion'.[21]

[19] *E.g.*, *Re Ross* [1930] 1 Ch. 377.
[20] 64 L.Q.R. 267–8; Dicey, rule 20, exception 2, pp. 149–150.
[21] At p. 467.

Another point of interest emerges from the judgment. Though debarred from making an order as regards foreign immovables, ought or may the court of the domicile, in making a declaration over assets within its jurisdictional power, take into consideration the existence of other property which it cannot bind directly? Or, in other words, when fixing the quantum of reasonable provision, ought it to have regard to legislation in the situs of land which the applicant could invoke to secure an additional order?[22] Here again, the court's opinion in *Re Paulin* is instructive and indicates a contrast to the compulsory share provisions. The learned judge first indicated the allowance he would have made as regards the whole estate and, estimating the value of the New South Wales land as constituting one-quarter of the net estate, arrived at his final determination by the reduction of the first proposal by the same fraction. While refusing to make an order conditional on the applicant also applying in New South Wales, he felt free to indicate to what extent his own order was reduced by the absence of power to affect the foreign land, principally so as to relieve the parties from further litigation by facilitating a private arrangement. It need not be emphasised that this approach may be of assistance also in the application of the Inheritance (Family Provision) Act, 1938, if and when a similar situation presents itself for adjudication to the English court.

J. G. Fleming.

### *The Renvoi in New South Wales*

No doubt readers of this Review like their case comments to be as topical as possible. Some justification is needed, therefore, for commenting now on a 1917 case on renvoi from New South Wales. The justification pleaded is that *Simmons* v. *Simmons*, 17 S.R. (N.S.W.) 419, seems to have been overlooked in all the well-known English, Canadian and American discussions of the renvoi problem, and that cases on renvoi are sufficiently rare to deserve the interest of the curious.

The interest of this case lies not in its departure from the familiar features of the English cases, but in the fidelity with which it reproduces them. A British subject whose domicile of origin was in New South Wales died intestate, domiciled de facto (in the English or New South Wales sense) in New Caledonia. He never acquired a de jure domicile in New Caledonia (in the New Caledonia sense) because he never obtained the authority of the French Government to reside there. (Though the report does not say so, this obviously

[22] Cf. Falconbridge, *op. cit.*, pp. 578–9.

refers to Article 13 of the French Civil Code, the effect of which has so often been considered by English courts and which was finally repealed in August, 1927.) He left movable and immovable property in New Caledonia and movable property in New South Wales. Evidence was given by a French solicitor and barrister practising in New Caledonia to the effect that by the French law prevailing there, the deceased's movables would be distributed in accordance with the internal law of his nationality. The New South Wales court interpreted this to mean ' the internal law applicable in that part of the British Empire in which the deceased had his domicile before he fixed his residence abroad ', in this case New South Wales. The court followed *Re Johnson* [1903] 1 Ch. 821, and distinguished *Bremer* v. *Freeman* (1857) 10 Moo.P.C. 306, and *Hamilton* v. *Dallas* (1875) 1 Ch.D. 257, on the ground that different evidence was given as to the French law in those two cases. The court restricted its decision to the movables in New South Wales, taking the view that the destination of the deceased's New Caledonia property was a matter for the New Caledonia courts.

Two observations are submitted. The first is that the court interpreted ' the national law of a British subject ' to mean, not the law of his domicile of origin, but the law of his last British domicile before he ' fixed his residence ' abroad. On pragmatic grounds this makes slightly better sense than interpreting it to mean the law of his domicile of origin, as other courts have done (for example, *Re Johnson, supra; Re O'Keefe* [1940] Ch. 134); though in the instant case the result was the same. Secondly, the French expert witness was positive that the French reference to the deceased's national law was a reference to its internal law and not to its conflict of laws. Nine years later in *Re Annersley* [1926] Ch. 692, there was a conflict of evidence among the French expert witnesses on this question, but Russell J. accepted the view that the French reference was a reference to the conflict of laws rule of the national law. These facts lend point to Maugham J.'s observation in *Re Askew* [1930] 2 Ch. 259, 278, that the result of acquiring a domicile in a foreign country must often depend on ' the doubtful and conflicting evidence of foreign experts '.

J. H. C. M.

## United Kingdom and Colonies

### *Statutes and Statutory Instruments*

The *International Organisations (Immunities and Privileges) Act*, 1950, consolidates the Diplomatic Privileges (Extension) Acts, 1944, 1946 and 1950, which are repealed.

Under this Act immunities and privileges may be conferred by Order in Council upon

(1) international organisations; Schedule, ss. 1–6;
(2) representatives on, high officers of, and persons on missions for, international organisations; Schedule, ss. 7–9;
(3) the official staffs of representatives on international organisations; Schedule, s. 12;
(4) the families of high officers of international organisations; Schedule, s. 13;
(5) other officers and servants of international organisations; Schedule, ss. 10–11;
(6) the judges and registrars of the International Court of Justice, and suitors to that Court, their agents, counsel and advocates.

These classes of persons are more specifically defined in the relevant Orders in Council.

In order that the immunities and privileges may be conferred on classes (1)–(5) the Order in Council must declare that the international organisation is one 'of which the United Kingdom or His Majesty's Government therein and one or more foreign sovereign powers or the government or governments thereof are members'. This novel distinction [1] between States and their governments, as members of international organisations, may be intended to cover such bodies as the Council of Europe. An international organisation so declared [2] is to have 'the legal capacities of a body corporate' and the immunities and privileges set out in the Schedule to the Act, Part I. It should be observed that the immunities and privileges set out in the Schedule are the maximum and the Order may prescribe less, subject to international obligations; and it shall in any case 'be so framed as to secure that there are not conferred on any person any immunities or privileges greater in extent than those which, at the time of the making of the Order, are required to be conferred on that person in order to give effect to any international agreement in that behalf'.[3] Similarly

[1] Introduced by the Diplomatic Privileges (Extension) Act, 1950, s. 1.

[2] Orders in Council (made under the repealed Acts but continued in force by section 7 (2) of this Act) have been made as follows:—S.I. 1949, No. 133 (International Labour Office); No. 834 (Food and Agriculture Organisation); No. 835 (UNESCO); No. 1048 (World Health Organisation, and ICAO); No. 1428 (United Nations, and International Court of Justice); No. 1831 (OEEC); No. 2190 (Brussels Treaty Permanent Commission); S.I. 1950, No. 1268 (Council of Europe).

[3] Section 1 (2). The international agreements to which effect has been given by existing Orders in Council are: Convention on Privileges and Immunities of the United Nations (Cmd. 6753); Convention on Privileges and Immunities of the Specialised Agencies (Cmd. 7653); Brussels Treaty, 1948 (Cmd. 7367); General Agreement on the Privileges and Immunities of the Council of Europe (Cmd. 7780).

those in class (6) are limited to 'such immunities, privileges and facilities as may be required to give effect to any resolution [4] of, or convention approved by, the General Assembly of the United Nations'.

No immunity or privilege may be conferred upon any person 'as the representative of His Majesty's Government in the United Kingdom or as a member of the staff of such a representative'.[5]

The Secretary of State's list,[6] published in the London, Edinburgh and Belfast Gazettes, is conclusive evidence that any person named within it is entitled to the immunities and privileges to which the list refers.

The Act also makes provision [7] for the grant of diplomatic immunities to the representatives of foreign powers attending an international conference in the United Kingdom where 'it appears to the Secretary of State that doubts may arise as to the extent to which the representatives of such foreign powers and members of their official staffs are entitled to diplomatic immunities', that is to say, where the representatives concerned are neither members of foreign missions in London nor persons within class (2) above; the Secretary of State may compile a list of such representatives to be published in the Gazettes, which is conclusive evidence of entitlement of persons named within it.

Parliament has laid a restraining hand on the extension of privileges and immunities by providing [8] that no Order in Council shall be made under the Act save upon an address of both Houses; further the Crown may, in conferring them, look for reciprocal treatment from foreign powers.[9]

It appears that, where a person in class (2) is the father of a child born within the United Kingdom, that child will not acquire British nationality.[10]

The *Colonial and other Territories (Divorce Jurisdiction) Act*, 1950, extends the scope of the principal Acts [11] to persons domiciled in Northern Ireland; provides means for applying these Acts to protectorates and trust territories; and enacts that divorce decrees

[4] In particular the General Assembly Resolution of November 11, 1946, described in the preamble to the Diplomatic Privileges (Extension) Act, 1946.

[5] But citizens of the United Kingdom and Colonies in classes (2)–(6), other than representatives and their staff members, may have immunities and privileges conferred on them.

[6] A list *must* be kept of persons in classes (2)–(4), and *may* be kept of persons in class (5): s. 2.

[7] Section 4 (1).

[8] Section 6 (1).

[9] Section 5.

[10] British Nationality Act, 1948, s. 4 (*a*). Similarly a grandchild of a high officer of the organisation if the father is under twenty-one.

[11] Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, under which jurisdiction was confined to parties domiciled in England or Scotland.

granted in certain protected States shall be valid in the United Kingdom. The broad effect of the Act is that divorce decrees and ancillary orders of courts in colonies, to which it has been extended,[12] and of courts in colonies, protectorates, protected States and trust territories to which the Act may be extended, in respect of British subjects domiciled in any part of the United Kingdom, will be recognised as valid in the United Kingdom.

The Act of 1926 provided in section 2 (1) as amended by S. R. & O., 1937, No. 230 : ' His Majesty may by Order in Council provide for applying the provisions of section 1 of this Act,[13] subject to the necessary modifications, to any part of His Majesty's dominions other than a self-governing dominion, in like manner as they apply [14] to India, and, in particular, any such Order in Council may determine the court by which the jurisdiction conferred by those provisions is to be exercised '. The result is that the designated court in a colony, to which these provisions have been or will be applied, will now have jurisdiction to make a decree for the dissolution of a marriage, and as incidental thereto to make an order as to damages, alimony or maintenance, custody of children, and costs, where the parties to the marriage are British subjects [15] domiciled in any part of the United Kingdom.[16]

But protectorates and trust territories are not in law part of His Majesty's dominions; section 2 of the present Act is therefore necessary to empower the Crown to extend the provisions of the principal Acts as amended to those territories, where the courts as and when designated by Order in Council will have the same jurisdiction as the designated court in a colony. The effect of section 6 (4) is that ' protectorate ' in this Act means any of the territories declared to be protectorates by Order in Council [17] made under the British Nationality Act, 1948, ss. 30 and 32 (1); and United Kingdom trust territory means a territory administered by His Majesty's Government in the United Kingdom under the trusteeship system of the United Nations.[18]

[12] Hong Kong, Jamaica, Kenya Colony, Singapore and Malayan Union.
[13] *I.e.*, for conferring divorce jurisdiction, as amended by section 2 of the Act of 1940 and section 1 of the present Act.
[14] Should now be read as ' would have applied ': see Indian Independence Act, 1947, s. 17 (1) and (4), for position in India and Pakistan.
[15] Presumably both of them; the fact that an alien woman does not now acquire British nationality by reason only of her marriage to a United Kingdom citizen will enlarge the class of marriages to which these provisions do not apply.
[16] Section 2 (1) of the Act of 1926, as amended.
[17] British Protectorates, Protected States and Protected Persons O. in C. (S.I. 1949, No. 140). They are: Aden Protectorate, Bechuanaland, British Solomon Islands, Gambia Protectorate, Kenya Protectorate, Nigeria Protectorate, Nyasaland, Sierra Leone Protectorate, Somaliland, Uganda and Zanzibar.
[18] *Viz.*, Cameroons, Togoland, and Tanganyika.

For the purpose of the recognition in the United Kingdom of divorce decrees and ancillary orders granted by their courts, protected States may under section 3 of the Act be assimilated to colonies, protectorates and trust territories, thus : ' If His Majesty in Council is satisfied (*a*) that under the law of any protected State a court of that State has the like jurisdiction to make decrees and orders in matrimonial causes, exercisable on the like grounds and in accordance with the like principles, as the jurisdiction exercisable by virtue of the principal Acts by a court in any part of His Majesty's dominions to which the provisions of section 1 of the Act of 1926 apply; and (*b*) that under the said law provision is made for the transmission of certified copies of such decrees and orders for registration in the court of the domicile, His Majesty may by Order in Council direct ' that the provisions [19] relating to registration of decrees and orders shall apply. Special provision is made in section 3 (3) for the Federation of Malaya, which comprises both protected States and British possessions, to some of which the provisions of the principal Acts have already been applied.[20] ' Protected State ' in this Act again has the meaning assigned by the Order [21] made under the British Nationality Act, 1948. Not all these protected States have divorce jurisdiction [22] as defined in section 3 (1) (*a*) of the present Act, but the Crown may confer it under the Foreign Jurisdiction Acts, 1890–1913.

The *Arbitration Act*, 1950, *Part II*, *ss.* 35–42, re-enacts sections 1–7 of the Arbitration (Foreign Awards) Act, 1930, with only minor changes : section 43 provides that any proceedings instituted under that Act, which are uncompleted at the commencement of the present Act may be completed as if they had been instituted thereunder. The Arbitration Acts, 1889 and 1934, the Arbitration Clauses (Protocol) Act, 1924, and the Arbitration (Foreign Awards) Act, 1930, are repealed, but the Protocol on Arbitration Clauses, 1923, and the Geneva Convention on Foreign Arbitral Awards, 1927, are incorporated in the present Act, Schedules I and II.

The *Adoption Act*, 1950, *ss.* 39 *and* 40, replace section 11 (1)–(8), (15) (*e*) of the Adoption of Children (Regulation) Act, 1939, relating

[19] See section 1 (*c*) of this Act.

[20] Singapore and Malayan Union O. in C. (S.R. & O. 1947, No. 2783).

[21] See footnote 7. It therefore comprises: Malay States (Johore, Patrang, Negri Sembilan, Selangor, Perak, Kedah, Perlis, Kelantan and Trengganu); Brunei; Tonga; Maldive Islands; Persian Gulf States (Koweit, Bahrein, Qatar, and Trucial Sheikdoms of Oman).

[22] For example, it is excluded by the Courts Enactment Act, 1908, for Brunei (*Hertslet Treaties*, Vol. XXV, p. 33); and in the Persian Gulf States (see, for example, Trucial States Order in Council, 1950, No. 1697). Divorce jurisdiction appears to exist in respect of Tonga under Pacific Orders in Council, 1893 (Article 47), and 1941 (No. 305).

to the restriction upon, and licence for, sending infants abroad [23] for adoption.

The *Foreign Compensation Act*, 1950, and *Maintenance Act*, 1950, will be noted in the next number.

The *Falkland Islands* (*Continental Shelf*) *Order in Council* (1950, No. 2100), is another move to extend British sovereignty over the seabed in the western hemisphere. By the Submarine Areas of the Gulf of Paria (Annexation) Order of August 6, 1942, made under the Royal Prerogative, effect was given to an agreement between the United Kingdom and Venezuela establishing a common boundary line on the seabed of the Gulf of Paria; the Order provided that certain areas defined by this line ' shall be annexed to and form part of His Majesty's dominions and shall be attached to the Colony of Trinidad and Tobago for administrative purposes '; but ' Nothing in this Order shall (*a*) affect or imply any claim to any territory above the surface of the sea or any part of the high seas, or (*b*) prejudice any rights of passage or navigation on the surface of the sea '. It may be noted that there is no reference to fisheries in this saving clause. In 1948 Orders in Council were made in similar terms under the Colonial Boundaries Act, 1895,[24] in respect of Jamaica and the Bahamas,[25] thus : ' The boundaries of the colony of the Bahamas (of Jamaica) are hereby extended to include the area of the continental shelf which lies beneath the sea contiguous to the coasts of the Bahamas (of Jamaica, including its dependencies) '.

The operative paragraph of the present Order in Council also made by reference to the Colonial Boundaries Act, 1895, reads : ' The boundaries of the colony of the Falkland Islands are hereby extended to include the area of the continental shelf being the seabed and its subsoil contiguous to the coasts of the Falkland Islands '; the area is defined by following the 100 fathom line from a point 023° Jason West Cay 110 miles clockwise around the islands to a point 278° Jason West Cay 20 miles and thence in the direction 032° for 115 miles to the starting point. There is a saving clause in identical terms in each of these three Orders in Council, which reads : ' Nothing in this Order shall be deemed to affect the character as high seas of any waters above the continental shelf and outside territorial

[23] That is to say, outside England, Wales or Scotland.

[24] Section 1 (1): ' Where the boundaries of a colony have, either before or after the passing of this Act, been altered by H.M. the Queen by Order in Council or letters patent, the boundaries as so altered shall be, and be deemed to have been from the date of the alteration, the boundaries of the colony '.

[25] Bahamas (Alteration of Boundaries) Order in Council, 1948 (No. 2574); Jamaica (Alteration of Boundaries) Order in Council, 1948 (No. 2575). These orders, save for the names of the colonial territories affected, are in identical terms.

waters ', and which seems to avoid the defect in the Gulf of Paria Order.

The continental shelf, from which the land mass of the Americas rises, was first made the object of a claim of sovereignty in the celebrated proclamation of President Truman in September, 1945, that the United States Government regarded the ' natural resources of the subsoil and seabed of the Continental Shelf beneath the high seas, but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control '.[26] Mexico made a similar proclamation in the following month; and in 1946 the Argentine claimed sovereignty over the Antarctic submarine platform *and* the water covering it.[27] Inspired by this precedent Peru has claimed an extension of territorial waters up to 200 miles from her coast.

Rights in the seabed and its subsoil outside territorial waters are, it is submitted, to be determined by international law, while those inside territorial waters are in the first place to be determined by municipal law. Thus, in England, it has been held that the bed of the sea for some distance at least below low water mark is prima facie vested in the Crown [28] and therefore islands which rise from the sea within British territorial waters are the property of the Crown.[29] Similarly, the Supreme Court of the United States has held that the United States is owner of the seabed, and the resources of its subsoil, underlying territorial waters.[30] In its latest judgment, given by Mr. Justice Douglas, the Supreme Court said : ' We intimate no opinion on the power of the State to extend, define or establish its external territorial limits or on the consequences of any such extension vis-à-vis persons other than the United States or those acting on behalf of or pursuant to its authority. . . . If as we held in California's case the three mile belt is in the domain of the nation rather than that of separate States, it follows a fortiori that the ocean beyond that limit also is '.[31]

[26] See Sir Cecil Hurst, ' The Continental Shelf ', *Grotius Soc. Trans.*, Vol. 34, p. 153.

[27] See Vallat, ' The Continental Shelf ', *British Year Book of International Law* (1946), p. 337, and Borchard, ' Resources of the Continental Shelf ', *American Journal of I.L.*, 40 (1946), p. 53.

[28] *Fitzhardinge* (*Lord*) v. *Purcell* [1908] 2 Ch. 139.

[29] *Secretary of State for India* v. *Chelikani Rama Rao* (1916) 85 L.J.P.C. 222. For a discussion of the Cornwall Submarine Mines Act, 1858, see Sir Cecil Hurst, ' Whose is the Bed of the Sea ?', B.Y.B.I.L., 1923–4, and Vallat *op. cit.*

[30] *United States* v. *California* (1947) 332 U.S. 19; *United States* v. *Texas* and *United States* v. *Louisiana* (1950) 339 U.S. 699.

[31] *United States* v. *Louisiana*, *supra*. This and the *Texas Case* have been somewhat inexactly called the ' *Tidelands Oil Cases* '. The last sentence quoted is not, it is submitted, to be understood as determining the question whether the United States has any rights to the waters or seabed *outside* its territorial waters; indeed, the earlier part of the quotation expressly renounces any such intention. It is rather the answer to the argument put forward by Texas and

(The legal status of the continental shelf has been made the subject of the Grotius Prize, 1952 : see this Quarterly (October, 1950) p. 589.)

## Decisions

*Tetau* v. *O'Dea* [1950] 2 All E.R. 695 : Jurisdiction in bastardy—domicile.

The appellant was a German national, domiciled and resident in Germany on August 15, 1949, when, a single woman, she gave birth to a child. On November 11, 1949, she came with her child to England at the instance of the respondent and took up residence here. On February 21, 1950, at West London magistrate's court, she obtained an affiliation order against the respondent, a British subject domiciled in England. The respondent appealed and Quarter Sessions allowed the appeal and quashed the order, on the ground that the facts were indistinguishable from those in *R.* v. *Blane*.[1] The appeal by way of case stated was dismissed by the Divisional Court without order as to costs.

Lord Goddard, C.J., held :—

(i) that in *R.* v. *Blane* a 'court of very considerable authority' had laid down 'in the clearest possible terms . . . that the bastardy laws of this country have no application where a bastard or a child appearing to be a bastard is born out of the country';

(ii) the highest at which the decision in *R.* v. *Humphrys, ex parte Ward*[2] ('a case . . . somewhat difficult to understand') can be put is that 'the majority of the court considered that, if the applicant was an English subject and was domiciled in this country, she could obtain a bastardy order notwithstanding that she was actually delivered of the child out of the country';

(iii) the Bastardy Law Amendment Act, 1872, provided that an application could be made within twelve months after the return to England of the putative father but made no provision for the mother who was out of England when the child was born and gave her no right of application upon her return;

Louisiana that the territorial waters of those States extended, for special historical reasons, for more than three miles from their coasts (Louisiana claimed twenty-seven miles); the Supreme Court replies that even if these claims were admitted the territorial waters so defined would still be territorial waters of the *United States* and not of the individual States adjacent. In other words, these decisions are solely in terms of the constitutional law of the United States.

[1] (1849) 13 Q.B. 769; 13 Jurist 354; 18 L.J.M.C. 216.

[2] [1914] 3 K.B. 1237.

(iv) the grounds on which the court in *R.* v. *Humphrys* distinguished *R.* v. *Blane* do not exist in the present case; and

(v) *R.* v. *Blane* must be regarded as good law and Quarter Sessions were right in considering themselves bound by it.

Donovan, J., suggested that the two earlier decisions might be reconciled in the following way :—

(i) ' In *R.* v. *Blane* there was no question of the woman being domiciled here. She was a Frenchwoman, described as a native of France, whose domicil of origin was therefore presumably French. There was no evidence of her having acquired a new domicil of choice ';

(ii) ' under section 3 of the Act of 1872 it must be ascertained whether the child is a bastard child. That means a bastard subject to English law. If the mother's domicil is English, English law applies to her personal status and also to that of her child, and therefore the child is a bastard within the meaning of section 3. . . . The appellant wants to show that the child is a bastard under German law, but in my opinion, section 3 contemplates no such inquiry '.

The only doubt in these cases is whether under the Act of 1872 no affiliation can be made in respect of any child born out of England or whether an affiliation order could be made in respect of such a child, if its mother is domiciled in England at the time of its birth and it thereby acquires an English domicile of origin.[3] In each of three cases we are considering the child was illegitimate by the law of England; but in *R.* v. *Blane* and *Tetau* v. *O'Dea* the question posed above did not arise since in each case not only was the child born abroad but the mother had a foreign domicile. In *R.* v. *Humphrys* it did arise since, though no evidence at all of the mother's domicile was given, it appears to have been presumed that her domicile was English, and the child was born in New South Wales. Maintenance Orders Act, 1950, however, has provided in section 27 (2):— ' It is hereby declared that any

[3] It is submitted that *R.* v. *Blane* and *R.* v. *Humphrys* were consistent with one another if, upon the reasoning of Donovan J. in *Tetau* v. *O'Dea*, the real basis of the decision in the first case was not simply that the child was born out of this country, but that it did not acquire domicile in England at birth. Cf. Bankes J. in *R.* v. *Humphrys*: ' If the facts proved before the magistrate show that the status of the child is governed by foreign law (*sc.*, the mother is not domiciled in England), . . . no doubt the case would fall within the principle of *R.* v. *Blane*; but in the absence of such evidence it is not the law, and *R.* v. *Blane* does not so decide, that in the case of a bastard child of English parents (*sc.*, of a natural father domiciled in England, so that child is illegitimate, and of a mother domiciled in England), the mere fact that the child is born abroad bars bastardy proceedings '.

jurisdiction conferred by Part I of this Act,[4] or any enactment therein referred to,[4] upon a court in any part of the United Kingdom is exercisable notwithstanding that any party to the proceedings is not domiciled in that part of the United Kingdom; and any jurisdiction so conferred in affiliation proceedings shall be exercisable notwithstanding that the child to whom the proceedings relate was not born in that part of the United Kingdom '.

This declaration appears to set at rest any doubts arising in the three cases discussed and it is submitted that the position now is:—

A woman may, regardless of her domicile or that of her child's natural father,[5] apply for an affiliation order in England, whether or not the child was born in England, if

(*a*) she and the natural father are resident in England; or

(*b*) she is resident in England and the father is resident in Scotland or Northern Ireland and the act of intercourse which resulted or may have resulted in the birth of the child took place in England.

*Re M. H. Hertogh, an infant: Hertogh* v. *Amina binte Mohamed and Others.*

Judgment in the Supreme Court, Singapore, was given in this case on December 2, 1950, by Mr. Justice Brown. Notice of appeal to the Court of Appeal of Singapore has been lodged.

I

Maria Huberdina Hertogh, known also by her Malay name of Nadra binte Ma'arof, was born in Java on March 24, 1937: her father was a Dutch soldier, domiciled in Holland and serving in the Royal Netherlands East Indies Army. Both her parents were Catholics and Maria was baptised a Catholic on April 10, 1937. Her mother was Eurasian brought up in Java. On the Japanese invasion of Java in 1942 Sergeant Hertogh became a prisoner of war; at the beginning of January, 1943, Maria was sent to stay with Che Amina binte Mohamed, for a few days according to Maria's mother, and for permanent adoption according to Che Amina. Mrs. Hertogh states that five days later she was arrested

[4] Including jurisdiction to make affiliation orders under the Act of 1872.

[5] But *quære* whether the domicile of the natural father must be taken into account in determining whether the child is a ' bastard ' for the purposes of section 3 of the Act of 1872. In *R.* v. *Blane* it was said it could not, since the Poor Law Acts were concerned only with ' bastards ' as understood in English law, that is, presumably, children born out of lawful wedlock; but now that place of birth is immaterial and affiliation orders may, under the Act of 1950, be made in respect of children born abroad, it is arguable that ' bastard ' in section 3 of the Act of 1872 must be construed where necessary by the English rules of private international law.

by the Japanese while she was on her way to fetch Maria back, and was interned until the end of the war; Che Amina denies this, and the facts are still undetermined. But in any case it is certain that Sergeant and Mrs. Hertogh returned to Holland at the end of the Japanese war, having lost all trace of Maria, who was brought up by Che Amina, a Muslim of the Shafi branch of the Sunni sect, in the Muslim faith and the Malay way of life. A prolonged search for Maria found her in September, 1949, living with Che Amina in Trengganu, Federation of Malaya.

On April 22, 1950, the Consul General of the Netherlands obtained an order for custody in the High Court of Singapore directing that Maria should be delivered to the Social Welfare Department, Singapore, until a further order should be made. On April 28, Che Amina, the foster-mother, was upon her application made a party to the proceedings. The Consul General of the Netherlands obtained a further order on May 19 directing the Secretary for Social Welfare to deliver Maria into his care and custody with liberty to restore her to the care of her parents in Holland: a stay of execution of this order was, however, granted pending appeal by Che Amina. On July 28, both orders were set aside by the Court of Appeal on the ground that the necessary parties had not been served as required by the Rules of the Supreme Court; the court observed that in any case the Netherlands Consul General had no capacity to claim custody of Maria, since such a claim must be based on parental rights and he was not specifically empowered to act on behalf of Sergeant Hertogh.

On August 1, Maria, called Nadra in Malay, went through a form of marriage with Inche Mansoor Adabi (a probationary teacher from Kelantan, Federation of Malaya); the ceremony was performed by a Kathi (Muslim priest) in Singapore.

Maria's parents then took out an originating summons in the High Court of Singapore under the Guardianship of Infants Ordinance, praying for

(a) a declaration of the illegality of the marriage of Maria;
(b) delivery of custody of the child with liberty to restore her to them in Holland;
(c) an order to keep the child within the jurisdiction of the court, pending the hearing.

Che Amina, Maria and Inche Mansoor Adabi were named defendants. An order was granted, to keep Maria within the jurisdiction of the court, on September 4. The case was heard before Mr. Justice Brown in the High Court of Singapore from November 20–24; both Mrs. Hertogh and Che Amina gave evidence.

II

Brown J. held :—

(a) that he had jurisdiction under section 11 (1) (*a*) (i) [1] of the Singapore Courts Ordinance to make the declaration asked for of the invalidity of Maria's marriage, since the declaration was 'merely ancillary' [2] to the plaintiffs' main purpose of obtaining the custody of their child, and the Court of Chancery, in exercising its jurisdiction over children, had in former days made declaratory orders [3] which were introductory or ancillary to the relief it proposed to administer;

(b) that 'after a most careful consideration of all the evidence [4] which bears upon this marriage, the age of the child, the opportunities which she had of knowing Mansoor, and the date of the marriage in relation to the date of the Court of Appeal decision, I am compelled to the conclusion that this purported marriage was a manœuvre designed to prejudice these proceedings, which is discreditable to all concerned. In saying that, I wish to make it clear that I am satisfied that the child was neither forced nor tricked into it';

(c) that the question whether the Kathi, who performed the ceremony, was incompetent [5] to act as 'wali' and give the bride in marriage, in the absence of her non-Muslim father, and whether the marriage was invalid for that reason need only be considered 'if the marriage is otherwise valid by the law of the colony';

(d) that, following the rule in *Sottomayor* v. *De Barros* (*No.* 2),[6] the validity of a marriage celebrated in

[1] Section 11 (1) reads: 'The original civil jurisdiction of the High Court shall consist of (*a*) the same jurisdiction and authority within the Colony as was formerly exercised in England by (i) the High Court of Chancery, including therein the jurisdiction to appoint and control guardians of infants; (ii) the Court of Queen's Bench; (iii) the Court of Common Pleas at Westminster; and (iv) the Court of Exchequer as a Court of Revenue as well as as a Common Law Court, and is now exercised therein by His Majesty's High Court of Justice'.

[2] It had been contended on behalf of the third defendant (Maria's 'husband') that the declaration of nullity of the marriage could not be made since the jurisdiction to make such a declaration was formerly exercised only by the ecclesiastical courts.

[3] He cited *Chapman* v. *Bradley* (1865) 4 De G.J. & S. 71.

[4] It appeared that Maria had reached puberty; that she had met Mansoor Adabi twice before the marriage; that Che Amina had consulted only the child herself about the impending marriage; and that the Kathi, who performed the ceremony, acted as 'wali' (the guardian who gives the bride in marriage).

[5] The learned judge cited opinions of publicists and decisions on the Muslim law applicable to this question, but did not find it necessary to decide it.

[6] (1879) 5 P.D. 94.

Singapore between persons of whom the one has a Singapore,[7] and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of Singapore [8];

(e) but that Maria's incapacity, under the law of her (father's) domicile, admittedly Holland, to contract the marriage, since she was under age,[9] existed also under the law of Singapore, unless she was a Muslim; and

(f) that, since her father had not waived or by his conduct abrogated his legal right [10] to control the religion of his child and had not consented to her becoming a Muslim, 'whatever the child may say and whatever ceremonies and teaching she may have undergone, she is not in the eyes of this court' [11] a Muslim; and

(g) that therefore the purported marriage was void.

Having regard to the welfare of the child (the learned judge referred to her age, prospects and the 'discreditable marriage') and to the expressed wishes of the parents,[12] particularly as to her religious upbringing, he gave custody of Maria to them.

*Re a Debtor, ex p. The Debtor* v. *Liguori and another* ([1950] 2 All E.R. 733)—Bankruptcy—Judgment creditor resident abroad—exchange control.

A creditor resident in Switzerland obtained final judgment in England, against a debtor resident in this country, for £6,087. Since Switzerland is not one of the 'scheduled territories' for the purposes of Exchange Control Act, 1947, the debt could not be paid unless the Treasury gave permission [1]; this permission was refused. On April 19, 1950 there was served on the debtor a bankruptcy notice in the following form, based upon the Exchange Control (Bankruptcy Notices) Order, 1949 [2]: 'Take notice that whereas the

7 It appeared doubtful whether Mansoor Adabi was in fact domiciled in Singapore.

8 Adapting the formulation in Dicey, *Conflict of Laws* (6th ed.), p. 784.

9 And also, *semble*, because it was a polygamous marriage.

10 *Re Agar-Ellis*, 24 Ch.D. 317; see also *Re Collins* [1950] 1 All E.R. 1057.

11 The question whether she was a Muslim fell to be determined by the lex fori, that is to say, English law as far as applicable; the learned judge in effect applied the rule that an infant cannot choose his or her religion contrary to the wishes of the father.

12 Guardianship of Infants Ordinance (cap. 50 of the Laws of the Colony), s. 11, provides: 'The court or a judge, in exercising the powers conferred by the foregoing provisions of this Ordinance, shall have regard primarily to the welfare of the infant, and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be'.

1 Exchange Control Act, 1947, s. 5.

2 Made by the President of the Board of Trade on March 28, 1949, under Schedule IV, para. 3 of the Act of 1947, which provides in part: 'Without

petitioning creditor, a person residing outside the scheduled territories, has obtained judgment against you for the sum of £6,087, and whereas permission of the Treasury for payment of the sum by you to him has not been obtained, you must within seven days after service of this notice on you, excluding the day of such service, pay into court in accordance with the rules of court [3] made pursuant to Schedule IV to the Act the said sum of £6,087, the amount of the said judgment whereon execution is not now stayed, or you must secure or compound for the same . . .'. The registrar held this notice to be valid and made a receiving order against the debtor, who appealed. Appeal dismissed with costs.

Sir Raymond Evershed M.R. held:—

(i) that, since the bankruptcy notice, which was prescribed in the Order,[2] proceeded on the footing that Order 42, r. 1 was a valid rule, the validity of the notice depended on whether that rule was or was not ultra vires;

(ii) that by the provisions of Schedule IV, in particular paragraphs 3, 5 (1) and 6, Parliament plainly intended 'first, that there should be an alternative means of discharge to the debtor, *viz.*, by payment into court, and, further, that the creditor should have the right to invoke bankruptcy procedure if the alternative means were not taken advantage of';

(iii) there is an obvious disparity between the word 'shall' in rule 1 (2) and the word 'enabling' in Schedule IV, paragraph 3 (*a*); but

(iv) Order 42, concerned with execution, is dealing with the consequences of an order of the court to pay money, and the word 'shall' in rule 1 (2) cannot be used to impose an obligation subject to a penalty; it merely provides for what is to be done where a court order directing payment cannot be performed according to its terms because of the Exchange Control Act, 1947; similarly the word 'enabling' is to be treated as equivalent to 'providing machinery whereby any person, etc.' For in the absence of some rule there would be no such machinery.

prejudice to the provisions of any enactments relating to the making of rules of court, rules of court—(*a*) enabling any person who is required by any judgment, order or award to pay any sum, if he apprehends that the payment of that sum is unlawful under this Act except with the permission of the Treasury, to pay that sum into court; . . . may be made. . . . Provided that (i) the form of any bankruptcy notice shall be such as may be prescribed by the Board of Trade'.

[3] R.S.C., Ord. 42, r. 1: '(2) Where any person is directed by any judgment, order, or award, to pay any money to or for the credit of any person who is resident outside the scheduled territories . . . he shall, unless the permission of the Treasury . . . has been given . . . , pay the amount thereof into court. (3) Payment into court under the preceding paragraph of this rule shall, to the extent of the payment, be a good discharge . . .'.

(v) rule 1 (2) therefore does not go beyond the powers conferred by Schedule IV on the rule making authority but simply provides machinery by which a judgment debt may be discharged by payment into court.

*Hopkins* v. *Hopkins* ([1950] 2 All E.R. 1035): Burden of proof of domicile—meaning of 'ordinarily resident'.

The parties were married in England in September, 1943: soon afterwards H. went abroad on active service, returning to England in 1945. The parties remained in England until 1949: on February 2 of that year H. flew to Canada to seek employment there; and on April 15, H., having returned, took W. with him to Canada. In May he obtained employment and on September 1 the parties took a bungalow upon a yearly tenancy; on September 20 W. returned to England and on October 11 filed her petition for divorce alleging cruelty and constructive desertion by H., who by his answer stated that he was at that time domiciled in Canada. By amendment to her petition W. alleged that, even if H. were domiciled, at the time of the petition, in Canada, the court had jurisdiction under the Matrimonial Causes Act, 1937, s. 13, or, alternatively, under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1) (*a*). Petition dismissed for want of jurisdiction.

Pilcher J. considered that the information of H.'s domicile of origin was very scanty but said: 'In a case of this character, all that the wife has to do is to make out a prima facie case. If through no fault of the wife's the available evidence is scanty, the wife has discharged her burden provided that the facts proved tend rather to show that the court has jurisdiction than that it has not'. He then found that the domicile of origin of H. was English, and further that at the date of the petition he had acquired a domicile of choice in Canada, so that apart from statutory provision the court had no jurisdiction to dissolve the marriage.

With regard to section 1 (1) (*a*) of the Act of 1949,[1] Pilcher J. held:

(i) 'it would . . . be impossible to say that during these five months (viz., April 15 to September 20, 1949) the wife was resident anywhere other than in Canada. During this period she was living

[1] 'The High Court in England shall have jurisdiction in proceedings by a wife for divorce, notwithstanding that the husband is not domiciled in England, if—(*a*) the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings'. Now repealed and replaced by Matrimonial Causes Act, 1950, s. 18 (1) (*b*).

in Canada with her husband, and neither she nor her husband had any home of their own in England. . . . If this be so, it is clear that the wife cannot say that she was resident in England for the necessary three years preceding the commencement of the proceedings.'

(ii) ' to find that she was also, during the period of her stay, " ordinarily resident " there involves a conclusion that—on the facts of this particular case, at least—the qualifying adverb " ordinarily " adds nothing to the adjective " resident ". Such a conclusion accords with the view taken by the highest tribunal in the country when called on to construe identical and similar words in the revenue Acts,[2] and . . . with the view of the meaning of the words taken by Somervell L.J. in *Macrae* v. *Macrae*.' [3]

The learned judge concluded that the petitioner had not brought herself within the section and that he had no jurisdiction to entertain her suit. He also held that the evidence could not sustain the plea of constructive desertion so as to make section 13 of the Act of 1937 applicable, and he dismissed the petition.

*Kenward* v. *Kenward* ((1950) 66 T.L.R. 150): Character and validity of a Soviet marriage—voidability of marriage and the doctrine of frustration.

The parties went through a form of marriage before a Soviet marriage officer in Archangel on October 16, 1945. K., the man, was a British subject serving in the Royal Navy, the woman a Soviet citizen. The register was apparently signed and certificates of marriage issued, but no questions as to health or previous marriage were put to the parties: no entries were made in their passports; and no reference was made to the civil code of the Soviet Union, all these steps being statutory requirements of the Soviet Marriage, Family and Guardianship Code, 1926, as amended in 1945, ss. 2, 4, 132 and 133. On October 18, 1945, K. left Archangel in his

[2] *Levene* v. *Inland Revenue Commissioners* [1928] A.C. 217, *per* Viscount Cave L.C., construing Income Tax Act, 1918, s. 46: ' The expression " ordinary residence " . . . differs little in meaning from the word " residence " as used in the Acts; and I find it difficult to imagine a case in which a man while not resident here is yet " ordinarily resident " here '; *per* Lord Warrington (p. 232): ' In particular it is . . . impossible to restrict its connotation to its duration. . . . If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered '.

[3] ' Where there are indications that the place to which (a person) moves is the place which he intends to make his home for, at any rate, an indefinite period, as from that date he is ordinarily resident at that place '. The question in that case was whether a husband was ordinarily resident in Scotland so as to oust the jurisdiction of justices to entertain a summons for maintenance of his wife.

ship and, owing to the refusal of the Soviet authorities to permit either the man to revisit the Soviet Union or the woman to leave that country to join him in England, the parties did not see each other again. K. petitioned for nullity of marriage; and three other husbands, also domiciled in England, who had gone through similar forms of marriage in the Soviet Union also petitioned for nullity. Hodson J. (as he then was) dismissed the four petitions [4] on the grounds that, under Soviet law, the certificates of marriage were conclusive evidence that the marriages were formally valid; and that, since English law, as the personal law of the husband in each case, determined the question of consent, under that law the marriages were not void for want of consent. K. appealed and his appeal was allowed.

Sir Raymond Evershed M.R.: (i) adopted the view of Hodson J. that the mistaken beliefs and hopes of K. that the Soviet authorities would not by administrative action prevent the parties from living together was not such a mistake as would, under English law as his personal law, invalidate his consent to the marriage;

(ii) considered that the question whether this marriage had the essentials of marriage, as understood by the law of England, was not determined by the decision of the Court of Appeal in *Nachimson* v. *Nachimson* [5] since in that case both parties were domiciled in the Soviet Union; but that the evidence [6] of the Soviet Marriage Code, s. 9, and of a decision in 1931 by the Supreme Court of the Soviet Union, both relating to the consortium of spouses, and relied on by the appellant, did not sufficiently establish that there is no duty of the spouses, under Soviet law, to live together, so as to render this marriage no marriage in the English sense;

(iii) held, however, that the statutory conclusiveness of the marriage certificate, under section 2 of the Soviet marriage code, as evidence of the marriage 'for the purpose of ordinary human commerce' did not, as the expert evidence below had shown, preclude court proceedings to have it set aside on grounds that it was wrongly given, that is, because of an omission or defect which went to the root; and

(iv) that it was plain not only that the statutory formalities had not been complied with but 'the subsequent actions of the

[4] *Way* v. *Way*; *Rowley* v. *Rowley*; *Kenward* v. *Kenward*; *Whitehead* v. *Whitehead* [1949] 2 All E.R. 959.

[5] [1930] P. 217.

[6] These statutory requirements were not complied with in any of the four marriages in question; further, a subsequent Soviet law forbade any marriage between a Soviet citizen and a foreigner. Bucknill L.J. expressed the court's inference from all these circumstances that 'The Russian officials in charge of the marriage registry at Archangel did not intend that these two people should contract a valid marriage'.

(Soviet) authorities seem . . . to give this absence of formalities an importance which they might otherwise not possess'; this absence in fact went to the root and rendered the marriage a nullity.

Lord Justice Denning, while not disputing these conclusions, based his opinion that the appeal should be allowed upon another ground, that 'it is voidable by our law by reason of a condition which has failed'. He said: 'The formal validity of the marriage is, no doubt, governed by the law of the place where the marriage takes place, but the substantial validity of it may depend on the personal law of one or other of the parties to it, that is, on the law where he or she is domiciled. The personal law of one party may attach a fundamental condition to marriage which does not exist in the personal law of the other, and, if he marries on the basis that that fundamental condition will apply, then it would be most unjust to hold him to the marriage after the condition has been broken or has failed. It all depends on whether the parties marry on that basis or not. If they do, then you may find that a marriage, although valid by the local law, is voidable by reason of a condition imported by the personal law of one of the parties and accepted by the other. In illustration he cited cases of polygamous marriage and then turning to the marriage in question said: 'The parties intended to come to England to live, and in England the right of matrimonial consortium is an essential condition of every marriage. The husband married his wife on the basis that that fundamental condition should apply. It was a condition of the marriage, imported by his personal law. That condition has been utterly destroyed by the subsequent action of the Soviet Government'.

The judgment of Denning L.J. comes to this that, where the parties to a marriage are domiciled in different countries but agree to establish the matrimonial home in one of those countries, the law of that country will determine the character and essential validity of the marriage and any conditions of marriage required by that law will be imported into the contract of marriage between the parties.[7] In other words the law of that country is deemed to have been chosen by the parties as the lex loci solutionis of the marriage contract.

This reasoning has the advantage of bringing together under one principle various instances of voidability of marriage; but the

[7] Similarly, the condition that a particular marriage shall be monogamous or potentially polygamous will be imported into the contract according to the requirements of the law of the intended matrimonial home. Denning L.J. did not hesitate to draw the conclusion that *Re Bethell* was wrongly decided. See generally Cheshire, *Private International Law*, 3rd ed., p. 271, foll.

question what constitutes failure of a condition for purposes of annulment of the marriage is quite distinct, and it may, with respect, be asked whether the condition in the present case has wholly failed, given the possibility that the Soviet authorities might relent or the wife escape to England. Speaking of such frustration Sir Raymond Evershed M.R. said: 'How is the court to decide whether the event which has happened is not only extraneous but irresistible?'.

*Re Suidair International Airways, Ltd.* ([1950] 2 All E.R. 920): English winding up ancillary to foreign winding up—not limited to matters of procedure.

Adjourned summons under the Companies Act, 1948, s. 325 (1) (*c*), for an order that a company, creditor of S.I.A., Ltd., was entitled to retain against the liquidator of S.I.A., Ltd., the benefit of two writs of fi. fa. issued at the instance of the creditor company on January 31, 1950, each endorsed to levy £8,789 18s. 4d. against S.I.A., Ltd., being an acknowledged debt of that company. S.I.A., Ltd., was incorporated in South Africa and on January 18, 1950, unknown to its London office and to the creditor company, a provisional winding-up order was made against it in South Africa, final order being made on February 14. On April 24, 1950, an order was made for the winding up of the company in England.

It was argued on behalf of the liquidator that the English winding up was ancillary to the winding up in South Africa, since the company was domiciled there; that it was not disputed that, according to the law of South Africa, the execution which was put into force after the date of the presentation of the winding-up petition in South Africa would be void and of no effect in South Africa; and that therefore the goods against which the execution has been put in force should be made available as assets of the company for the benefit of all creditors. In other words, effect should be given to South African law as the law governing the principal liquidation.

Wynn-Parry J.:

(i) explained the judgment of Vaughan Williams J. in *Re English, Scottish and Australian Chartered Bank*[8] thus: 'I do

[8] [1893] 3 Ch. 385, 394: 'The general principle is ascertain what is the domicil of the company in liquidation; let the court of the country of domicil act as the principal court to govern the liquidation; and let the other courts act . . . as ancillary . . . to the principal liquidation. But . . . it has always been held that the desire to assist in the main liquidation . . . will not ever make the court give up the forensic rules which govern the conduct of its own liquidation'.

not read Vaughan Williams J. as confining himself to what, on a narrow view, may be said to be matters of procedure. I think that he intended his observations and the statement of the principle to apply to the decision of all questions arising in the ancillary liquidation'; and said:

(ii) 'I can see no sound reason for distinguishing between matters of procedure viewed in that narrow sense and matters of substantive rights. It appears to me that the simple principle is that this court sits to deal with the assets of the South African company which are within its jurisdiction, and for that purpose administers and administers only the relevant English law . . . as stated in the Companies Act, 1948, . . . in the light where necessary of the decided cases'.

## Parliament

### *Antarctic Territorial Claims*

In a written answer on February 19, 1951, to a question about the Argentine military[1] and scientific expedition, which had embarked in the *Santa Micaela* for the British antarctic zone, the Minister of State said that (1) no approval for this expedition had been sought from the U.K. Government; (2) the U.K. Government did not recognise any Argentine claims in respect of the Falkland Islands Dependencies,[2] but had offered to refer the matter to the International Court of Justice for decision; this offer had not so far been accepted; (3) both local and diplomatic protests against Argentine movements had been made.

### *Registration of Treaties*

In a written answer on February 19, 1951, the Minister of State stated that 'about 250' treaties or agreements, with foreign countries or members of the Commonwealth, had not yet been registered with the United Nations under Article 102 of the Charter: of these 225 were 'in process of registration', the majority having already been published; the remainder had all been published and will be registered when they enter into force.

[1] On November 20, 1950, the following joint declaration was made: 'Being anxious to avoid any misunderstanding in Antarctica which may affect the friendly relations between the United Kingdom, Argentina, and Chile, the Governments of these three countries have informed each other that in present circumstances they foresee no need to send *warships* south of latitude 60 degrees during the 1950 to 1951 Antarctic season apart of course from movements such as have been customary for a number of years'.

[2] See Waldock, 'Disputed Sovereignty in the Falkland Islands Dependencies', *B.Y.B.I.L.* (1948), p. 311.

### *United Nations*

Three Labour and three Conservative members have signed a motion, asking that an amendment of the United Nations Charter be proposed, in the following terms:—

> 'That this House accepting the urgent need for strengthening the nation's defences, but believing that since defence is the corollary of the enforcement of law and since the United Nations as at present constituted is structurally powerless to enforce world law for which purpose it was created, calls upon His Majesty's Government to propose under Article 109 [3] an amendment to the Charter so that the United Nations Organisation shall have the structure and powers of an authority able to enact laws and enforce them.'

### Nationality Provisions of the Italian Peace Treaty

The collective change of citizenship as an effect of the change of territorial sovereignty has always operated in toto, and there are abundant historical examples of it in treaty practice.

For a considerable time, however, the individual 'right of option' has been admitted, and this has been applied on a large scale. The choice, however, for obvious reasons, was always subject to a time limit, generally a very short one, and frequently to very hard conditions, including the obligation to emigrate. (Gemma, *Points of Private International Law*, Padua 1936, 59.) In some cases of older date the sale of immovable property was also required of an owner opting out of the new nationality, frequently, however, treaties contain clauses authorising such property to be retained.

The Italian Peace Treaty and the Permanent Statute of the Free Territory of Trieste, provide respectively (Art. 19, *seq.* and 6 *seq.*) for the case of persons affected by the transfer of territory, and enable them to exercise the right of option. The provisions were so badly formulated, however, that while it is to be hoped that they may be revised and a special law passed which clarifies their application, they should be reconsidered, particularly those which affect matrimonial law.

Let us come first to the text of the Treaty. Article 19 (2) contains the following sentence: 'The option exercised by the husband will not be regarded as an option on the part of the wife',

[3] Amendments under this Article may be proposed only at a General Conference of Members of U.N., to be convened in accordance with the provisions of that Article. However, it appears that under Article 108 the General Assembly may at any time 'adopt' amendments by a two-thirds majority. In either case amendments take effect only upon ratification by two-thirds of the Members of U.N., including all the permanent members of the Security Council.

and the same words are repeated in Article 6 of the Permanent Statute for Trieste. Such a regulation could have serious consequences. It can only mean that the wife does not have to follow the nationality of her husband : he could choose to be Italian, she could choose otherwise, and vice versa. Nothing unusual will arise if both make the same choice, as their common national law will regulate their matrimonial relations. But the weak point of the disposition is the question of which law will regulate their relations when their respective choices do not coincide.

It is impossible to refer to some other Treaty of the same kind in order to see how it was implemented, as there do not appear to be any precedents. Italy has rarely had to cede any of her territory. For example in the Treaty of Paris of March 24, 1860, between France and Italy, when Nice and Savoy were ceded to France, Article 6 laid down that Sardinian nationals or persons domiciled therein who wished to retain their Sardinian nationality, had the right of opting within a year of the exchange of Notes ratifying the Treaty. No occasion arose for this Treaty or its implementation to be discussed in the Italian courts, but the French courts have frequently decided that, apart from exercise of the right of option, people born in the territory ceded to France, as well as those domiciled there, had become French citizens. No guidance in interpretation is to be found in the Peace Treaty of St. Germain 1919, or in the Treaty of Rapallo 1920. Article 7 of the latter Treaty states only that the persons affected, up to November 3, 1918, had the right of opting for one year after the Treaty came into force; while Article 18 of the Treaty of St. Germain states, with more wisdom, that ' the choice of the husband includes implicitly that of the wife, and the choice of the parents that of minor children '. Likewise Article 82 : ' married women will follow the status of their husbands, and children under eighteen that of their parents '. Thus formulated, the law leaves no room for doubt, or for conflict between two systems of law, as will presumably arise in respect of Article 19 and Article 6 referred to above.

Referring therefore to Italian legislation, there is no doubt that Italy will act in accordance with Article 8 of the Second Hague Convention (June 12, 1902) enforced by the law of September 7, 1905, No. 523 (' . . . if the spouses do not have the same nationality, their last common law will be considered their national law . . .'), and by Article 18 of the *General Dispositions Governing the Italian Civil Code* (' . . . the personal relations between the spouses of different nationality are governed by the last national law common to both of them during the marriage, or if this does not exist, by the husband's national law at the time of the marriage ').

It is, nevertheless, to be noted that this problem is not new to the Italian legal system. The Law of Nationality, June 13, 1912, No. 555, contemplates the possibility of spouses of different nationality. It is stated in Article 11, paragraph 3 ' if the spouses are legally separated and there are no children, the wife may declare that she wishes to retain her own nationality '. There does not, however, appear to be any decision on the point in the Italian courts.

The position is almost identical with that which has existed for a long time with regard to Switzerland, although in the case to which reference is made, there is also a question of dual nationality, which will not necessarily arise in consequence of the implementation of the Treaty. A Swiss woman married to an Italian national, after obtaining a legal separation according to Article 10 (*b*) of the Federal Law, July 25, 1903 (modified on June 26, 1920) regarding the acquisition and renunciation of Swiss nationality (see *Collection of Laws of the Ticino Canton—I*—p. 77 *seq.*), may apply to reacquire her original nationality. And not only can she reacquire Swiss nationality on being legally separated from her husband, but she can also ask for a divorce in her own country, although according to Italian law she is still an Italian national. It was for this reason that Switzerland withdrew from the 1902 Convention after Italy decided not to accept the protocol signed in 1928 at the sixth session of the Hague Conference.

Somewhat similar cases can arise following the implementation of Article 19 of the Peace Treaty and Article 6 of the Statute regarding the town of Trieste. A married woman who opts to become Yugoslav, for example, can apply to her national courts for a dissolution of her marriage to her husband who has remained an Italian national. He will then be in the same position as the Italian husband separated from his wife who was of Swiss origin. Thus, while the Yugoslav or Swiss wife will be able to contract a second marriage with one of her own countrymen, or with anyone else except an Italian (because according to Italian law she is still married), the husband will be tied to a woman whose own national law allows her to dissolve the union and remarry.

The foreign judgment which dissolved the marriage could never be rendered valid in Italy, firstly because it is not in accordance with Article 8 of the Second Hague Convention and Article 18 of the *General Dispositions Governing the Italian Civil Code*, and secondly because such a judgment is contrary to the original Hague Convention to which Italy adhered (Articles 1, 2 and 8) and to

Italian public policy which does not admit divorce between Italian nationals. It makes no difference if the decree is granted by the courts of a country which is not a party to the 1902 Convention, or has been a party for a time only.

Should the Yugoslav or Swiss wife obtain an annulment of her marriage from her own national courts, the possibility of such judgment being recognised in Italy is governed by Article 34 of the Concordat between Italy and the Holy See, if the marriage was celebrated after 1929.

Milan. Avv. V. E. Orlando.

## The Renvoi in New York

In a Note in the *Law Quarterly Review* under the above title (Vol. 36, p. 91), the then editor, Sir Frederick Pollock, commented on the case of *Re Tallmadge*, 181 N.Y.Supp. 336 (Surr.Ct. 1919). An American citizen with a New York domicile of origin who died domiciled in France made a will dividing his residue equally between two named legatees, one of whom predeceased him. By the New York conflict of laws, succession to movables is governed by the law of the domicile. By French domestic law, the lapsed share passed to the surviving legatee; but by the French conflict of laws rule, the matter fell to be determined by the national law of the testator, which was apparently interpreted to mean New York law; and by New York law the lapsed share was undisposed of. The court held that the renvoi doctrine was no part of the law of New York; that the reference to the law of the domicile must be interpreted to mean the domestic rule of French law; and that the surviving legatee was therefore entitled to the lapsed share.

The same court (differently constituted) has recently had occasion to review the renvoi problem: *Re Schneider's Estate*, 96 N.Y.S. 2d. 652 (Surr.Ct. 1950). A naturalised American citizen of Swiss origin who died domiciled in New York made a will devising land in Switzerland away from the legitimate heirs who were entitled to it by Swiss law. After the testator's death the land was sold and the proceeds remitted to New York. By the New York conflict rule, the validity of the devise fell to be determined by Swiss law as the law of the situs; but there was evidence that the Swiss conflict rule would refer the matter to the internal law of New York as the law of the testator's domicile. It was held that the reference to Swiss law meant the whole of Swiss law, including its conflict rules, with the result that the domestic law of New York was applicable and the

devise was valid. 'The broad assertion in *Matter of Tallmadge* (*supra*) that the renvoi principle is not applicable in New York is not in accord with the earlier or later cases.'

The two cases, though apparently in conflict, would appear to be readily distinguishable. In the *Tallmadge Case* the court was concerned with a question of construction, governed, according to the normal conflict rule, by the law intended by the testator, which is presumed to be the law of his domicile. The situation therefore presented a relatively weak case for the application of the renvoi doctrine, since, if intention is the test, it must be assumed that the majority of testators have never heard of the renvoi doctrine and would therefore expect the internal law of their domicile to control. In the *Schneider Case*, on the other hand, the court was concerned with the title to land situated abroad, a situation which presents a relatively strong case for the application of the renvoi doctrine. This is recognised by nearly all recent writers on renvoi, among whom even those whose tendency is to reject the doctrine recognise an exception in the case of title to foreign land. Their argument is well put by Judge Frankenthaler in the instant case : 'The meaning of the term "law of the situs" can be ascertained best from a consideration of the reasons underlying the existence of the rule. The primary reason for its existence lies in the fact that the law-making and law-enforcing agencies of the country in which land is situated have exclusive control over such land'. Hence, an adjudication at the forum which ignored what the courts of the situs had decided or would decide would be a brutum fulmen. A decision in favour of X, who might be entitled according to Swiss internal law, would be ineffective if Swiss officials would not help him to recover the land from Y, who might be entitled according to the internal law of New York. The land, to be sure, had been sold and the proceeds were now under the control of the New York court. But this fact was fortuitous, since the rights of the parties crystallised at the time of the testator's death.

It will be noticed that the *Schneider Case* is free from the logical difficulties which loom so large in discussions of the renvoi cases. There was no question of having to decide the question of domicile twice over, since the testator was domiciled in New York in the New York sense as well as in the Swiss sense. There was no difficulty in determining the national law of an American citizen, since the Swiss conflict rule referred to domicile, not to nationality. There was no *circulus inextricabilis*, since the Swiss conflict rule referred to the domestic law of New York and not to its conflict rule.

J. H. C. M.

## Double Taxation Agreements

(*Published since March 27, 1950,*[1] *and prepared by Mr. F. E. Koch*)

### 1. *Conventions and Arrangements*

a. Arrangement between the United Kingdom and the Argentine Republic for the relief from Double Taxation in relation to income tax or profits tax and taxes of a similar character imposed by the laws of Argentina on Shipping and Air Transport Profits. (July 28, 1949. SI No. 1435.)

b. Arrangements between the United Kingdom and the following Governments for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income :

British Solomon Islands Protectorate. (May 10, 1950. SI No. 748.)

Fiji. (May 10, 1950. SI No. 749.)

Gilbert and Ellice Islands Colony. (May 10, 1950. SI No. 750.)

Israel.[2] (May 10, 1950. SI No. 751.)

North Borneo. (May 10, 1950. SI No. 752.)

Brunei. (December 8, 1950. SI No. 1977.)

Sarawak. (December 8, 1950. SI No. 1979.)

c. Agreement between the United Kingdom and Ceylon for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income. (July 26, 1950.)

d. Convention between the United Kingdom and the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income. (December 14, 1950.)[3]

[1] See this Journal of July, 1950. Some of the arrangements listed there and in this issue under ' Double Taxation Agreements ' are included among ' Statutory Instruments ' in the issue of October, 1950, and among ' Agreements and Other Documents ' in the issue of January, 1951.

[2] Which adopts the arrangement scheduled to the Double Taxation Relief (Taxes on Income) (Palestine) Order, 1947 (S.R. & O. No. 2871), with necessary adaptations in relation to the territory of Israel.

[3] With the entry into force of the new Convention, which has not yet been ratified, the former agreements with France of October 1, 1932 (for the exemption from tax on profits from shipping), of April 9, 1935 (for the exemption from tax on profits from air transport), and of October 19, 1945 (for relief from double taxation on certain profits from agencies and in other special circumstances), shall be terminated.

2. *Statutory Instruments giving effect to Double Taxation Conventions* [4]

a. The Double Taxation Relief (Taxes on Income) (Denmark) Order, 1950. (July 21, 1950. SI No. 1195.)

b. The Double Taxation Relief (Taxes on Income) (Netherlands) Order, 1950. (July 21, 1950. SI No. 1196.)

c. The Double Taxation Relief (Estate Duty) (Netherlands) Order, 1950. (July 21, 1950. SI No. 1197.)

d. The Double Taxation Relief (Taxes on Income) (Ceylon) Order, 1950. (December 8, 1950. SI No. 1978.)

3. *Regulations to carry out Double Taxation Conventions* [5]

a. The Double Taxation Relief (Taxes on Income) (Netherlands Dividends) Regulations, 1950. (August 26, 1950. SI No. 1442.)

[4] After their ratification by Parliament, as provided by section 51, Finance (No. 2) Act, 1945.

[5] The system of relief from double taxation by credit of foreign tax against United Kingdom tax under the provisions of Finance (No. 2) Act, 1945, and Finance Act, 1947, is limited to countries with which international agreements, providing such relief, were concluded. Although the Government of the United Kingdom tried to widen the scope of relief by bilateral agreements as much and as quickly as possible, there remained a substantial burden of double taxation on income derived in countries which did not feel inclined to join such system of bilateral relief. In order to alleviate the hardship of taxpayers resident in the United Kingdom the Government of the United Kingdom found it necessary to introduce a measure of unilateral double taxation relief in cases where no agreement on double taxation relief could be reached with the foreign country in which the doubly taxed income arose.

The new relief was introduced by section 36 of the Finance Act, 1950, which applies the first time to income tax for the year 1950–51 and to profits tax for any chargeable accounting period ending after the end of March, 1950.

Before the new relief came into force, unilateral relief from double taxation was given either by way of deduction of foreign tax from foreign income under Rule 1 of the Rules to Case IV of Schedule D to the Income Tax Act, 1918, or, where income tax was paid in a British possession on income derived from there, relief was provided by section 27 of Finance Act, 1920 (Dominion income tax relief). The relief was limited to the Dominion rate of tax or one-half of the appropriate rate of United Kingdom tax (in the meaning of Finance Act, 1927, Fifth Schedule, Part II, 2 (v)), whichever was the lower. Any excess of Dominion tax was, in the case of a reciprocating Dominion, allowed by the Dominion, otherwise deducted from income for United Kingdom tax purposes.

The new unilateral relief which abolishes the Dominion Income Tax Relief, except in so far as it applies under the agreements with the Republic of Ireland, adopts the system of credit of foreign tax against United Kingdom tax under an international double taxation relief agreement. The credit, subject to certain modifications, is computed in the same way (as provided by Schedule IX to Finance Act, 1947), but the amount of the credit is limited to three-quarters of the effective United Kingdom rate in the case of a Commonwealth territory (Dominions, India, British Protectorates and protected States and any trust territory administered by any Government of any part of a Dominion) and one-half in any other case. Any amount of foreign tax exceeding the limit is allowed as deduction from the foreign income.

While under Finance (No. 2) Act, 1945, credit is given only to residents of the United Kingdom, the new unilateral relief applies to non-residents of the

b. The Double Taxation Relief (Taxes on Income) (Swedish Dividends) Regulations, 1950. (August 26, 1950. SI No. 1443.)

c. The Double Taxation Relief (Taxes on Income) (General) (No. 2) Regulations, 1950. (September 11, 1950. SI No. 1517.)

United Kingdom who are resident in the Isle of Man or the Channel Islands. Also, where United Kingdom tax is charged under Schedule E (office or employment), relief by credit of foreign tax is due to a person who is not resident in the United Kingdom, if he performs the services, from which the income is derived, wholly or mainly in the country where he resides.

# BOOK REVIEWS

*A Comparative Survey of Anglo-American and Latin-American Law.* By Phanor J. Eder. [New York 1950. London : Geoffrey Cumberlege, Oxford University Press. xii and 257 pp. including bibliography and index. 48s.]

Mr. Eder, who has long been a familiar and well-respected figure at international conferences on comparative law, has produced a lively book that ranges over a very wide field. The book is based, with additions, on a series of lectures given in Spanish to the Inter-American Academy of Comparative and International Law given at Havana in February, 1947, and repeated in English at the opening of the Inter-American Law Institute of New York University later that year. Few could emulate such a tour de force.

Primarily for Latin-Americans, the book serves a valuable purpose for Anglo-Saxon readers because it enables them to see the impact of their Anglo-American legal institutions upon lawyers of different schools of thought within another system: some appreciation of this kind of impact is, as Professor David has well said, essential for those concerned in matters of private international law.

The first chapter on sources of law is of particular interest for the comparison of the position of custom at common law, where it is clearly a source of law (*pace* Austin) and in Latin-America where it tends to be limited to commercial matters and is usually required to be proved whenever invoked.

The next chapter, dealing with the unity and supremacy of law, rightly stresses the danger of the misuse of the Roman law distinction between public and private law which, if pressed too far, might result in an ' unlimited power ' over the individual citizen. The great merit of the public and continuous oral trial of the common law, with the possibility of a jury, as a means of safeguarding individual liberty, is well brought out (pp. 37–8). The impression one gains is that Latin-American procedural systems bear a marked resemblance to Chancery proceedings, with interrogatories and affidavits.

Chapter III on Torts shows the advantages and disadvantages of allowing a civil claim to be dealt with in criminal proceedings —a procedure used in Colombia but not so much in the Argentine (pp. 45–6). The author prefers to keep these matters separate. The reviewer is not so sure : the ' parquet civil ' of French law (the equivalent of the Colombian system) which was discussed in *Raulin* v. *Fischer* [1911] 2 K.B. 93 seems a reasonable institution

as the court there found: after all, for a long time proceedings in trespass were criminal in form. Incidentally, it is curious to find that the phrase *res ipsa loquitur*, so beloved of common law counsel in running down cases, does not seem to be used in Latin-American legal literature (p. 62). Chapters IV and V deal with equitable matters in a most interesting way. The reader will find that some Chancery institutions have similar counterparts of different origins in Latin-America. 'The duties of a trustee . . . as regards the management of property are not unlike those of a guardian in Latin-American law (p. 98), . . . some of the duties of the trustee are like those imposed on . . . "mandatorios"' (p. 99); the Anglo-Saxon conceptions of estoppel (p. 74), of 'cy-près' (p. 109), of the 'constructive trustee' and of the 'resulting trust' (p. 107), can be paralleled by different procedures in Latin-America, to some extent (p. 112); but 'future interests' are not developed there (p. 114), and the express trust is unknown save in Mexico and Panama. Incidentally, the latest Mexican draft on trusts would appear to confine them to corporate trustees. Powers of appointment are 'not for export'.

Chapter VI, entitled a General Survey, contains an interesting account of the different conceptions of property and of possessory actions in the two legal systems (pp. 124–5). The account of 'title insurance' used by North American conveyancers is interesting; there are one or two statements about English land law that are rather too general; registration of title is not yet compulsory in most of England (p. 126), and though we do not have the spendthrift trust (p. 105), we do have the protective trust which resembles it; and perhaps, too, it might have been stated that since *Saloman's Case* [1897] A.C. 22, the English courts are more reluctant to look behind the veil of corporate personality than are the American (p. 137), at any rate when there is no question of 'enemy control'. But these are minor points. Anyone interested in the details of Latin-American company law can look at the work of M. Sola di Canizares.

The difficulty of explaining the 'undisclosed principal' to lawyers not of the common law tradition is one that the reviewer can sympathise with, having had to undertake that task in connection with the projected draft Uniform Laws on Agency and Commission of the Institute for the Unification of Private Law. The conception of mandate seems to dominate non-Anglo-Saxons and to condition their thinking on this matter.

In a concluding chapter on comparative law the author makes some strong points in favour of sound and prompt law-reporting (p. 144) and on the importance of judge-made law (p. 158). The field for unification of law is, in the author's view, not a wide one, and he may perhaps appear unduly pessimistic about the chances of unifying even commercial law. With respect, we do not share

his pessimism to this extent. Complete uniformity of interpretation may not be possible even within one country, as witness the conflict between the *Vita Food Case* [1939] A.C. 277, and *The Torni* [1932] P. 78. But good progress has already been made in making more uniform matters of transport and international commerce. A book like this serves, however, to open one's eyes to the difficulties that might be concealed by a less learned or a less ingenious author than Mr. Eder. Mr. Eder, a busy practitioner in two hemispheres, has written a modest and generous book with a depth of insight and a breadth of knowledge that few academics could equal; indeed, probably no-one in this country has such a range in Latin-American law and practice. We congratulate him and recommend the book to all law librarians.

B. A. Wortley.

*Précis de Droit Aérien.* Riese and Lacour. [Paris: Pichon et Durand-Auzias. 1951. 374 pp.]

This book is largely based upon the ampler work which in 1949 gave Dr. Riese an established position among writers on air law (Luftrecht: Stuttgart 1949). M. Lacour has added a chapter on the penal aspects of air law.

Its description as a 'précis' is perhaps unduly modest: the treatment of the subject is comprehensive as well as being a model of clarity, and there is room for some critical and stimulating examination of legislation both national and international and also for constructive suggestion.

In those portions of the book which are concerned with international air law—and they exceed those devoted to Swiss domestic law—Dr. Riese has drawn preponderantly on continental writers and legislations as well as on the work of C.I.T.E.J.A., of which he was himself a member: this gives the book homogeneity but also involves certain disadvantages. The references to United States law and practice are meagre and the interesting codes of Central and South America might have been thought as worthy of study as the laws of Germany. No doubt a volume in itself is now required to deal with the body of administrative law and jurisprudence which has grown up round the vast air industry of the United States, but the time has passed when these developments can be summarily disposed of as particularities of Anglo-Saxon law.

It is quite true, as Dr. Riese points out, that the surviving European States could, applying the methods of C.I.T.E.J.A., without difficulty agree upon conventions on certain matters; the author points particularly to the Geneva Convention on Rights in Aircraft of 1948 and claims that, on the above basis, a simpler and clearer agreement could be reached. But the question remains

what would be the worth in practice of a paper agreement in which the State preponderant in finance and industry had not participated.

The greatest obstacle to progress in air law now lies in the wide gulf which separates the law and practice of the United States from that of European countries. Perhaps it may not be too much to hope that Dr. Riese will one day devote his remarkable powers of exposition and constructive analysis to an attempt to bridge this gap.

R. O. WILBERFORCE.

*United Nations Textbook.* Compiled by Telders Study Group at Leyden University. Introduction by MANLEY O. HUDSON. [Universitaire Pers Leiden. 1950. xvi and 355 pp. 5 florins.]

THIS may claim to be the best handbook of United Nations and related documents yet made. Well printed, easy to read and of pocket size it contains an extraordinary amount of material. Part 1 contains 'some documents and notes on the history of the Charter': among them are the League Covenant; the Atlantic Charter; the Moscow, Teheran and Yalta Declarations; Notes on the Dumbarton Oaks and San Francisco Conferences; and a list of further references. In Part 2 we find the Charter of the United Nations with relevant documents inserted as annexes to the principal chapters, including the Human Rights Declaration; the Statute of the International Law Commission; the revised General Act of 1928; Constitution of the I.L.O.; Genocide Convention; a list of Trusteeship Agreements and texts of the Agreements for Nauru and the Pacific Islands; the Headquarters Agreement between the U.N. and the U.S.A.; the Convention on Privileges and Immunities of the U.N.; the Rules of Procedure of the General Assembly and three Councils of the U.N.; and other notes and documents.

Part 3 contains the Statute and Rules of the International Court with a list of its judgments and advisory opinions up to July, 1950; the conditions upon which non-parties to the Statute shall have access to the Court, and some of the declarations made under the 'optional clause'.

Part 4, entitled Regional Pacts, contains the Benelux Customs Convention; Brussels Treaty; North Atlantic Treaty; O.E.E.C. Convention; Statute of the Council of Europe; the Charter of the Organisation of American States and five related instruments; the Caribbean Commission Agreement; the South Pacific Commission Agreement; the Arab League Pact; and the Australia-New Zealand Agreement of 1944.

*British Nationality.* By Clive Parry. [London : Stevens & Sons, Ltd. 1951. xix and 216 pp. 30s.]

This work was originally designed as a revision of the chapter on Nationality in the fifth edition of *Dicey's Conflict of Laws.* However, the British Nationality Act, 1948, called for a complete recasting and, opinion among the editors of the sixth edition of Dicey being divided on the question whether the topic of nationality should appear at all in a work on the Conflict of Laws, it was decided to deal with it in a supplement. The present work therefore offers a complete treatment of the law of nationality of the United Kingdom, and is arranged according to the method of Rule, Exception, Comment and Illustration familiar to users of Dicey. The appendix contains the British Nationality Act, 1948, and the Ireland Act, 1949, ss. 1–5.

Nationality law is a kind of algebra, and Mr. Parry manipulates his brackets and symbols with great virtuosity, exploiting the Rule method to the utmost. He devotes some forty pages to a compact statement of the law before 1949, which will have to be resorted to in determination of nationality for a long time to come, and refers from time to time to Dr. Mervyn Jones' work on British Nationality published in 1947. In considering British Nationality after 1948 he first sets out the categories of British nationals (British subjects, comprising citizens of the United Kingdom and Colonies and citizens of Commonwealth countries; British subjects without citizenship and British protected persons) and traces the complicated provisions in the Act of 1948 and the Ireland Act, 1949, relating to the citizens of the Republic of Ireland. He observes (p. 67) that 'the status of a British subject is (the transitional cases apart) now no longer in strictness a nationality, but a status involving the possession of the nationality of one or more of nine countries' and again (p. 180) 'the creation of the device of citizenship of the United Kingdom and Colonies is a foundation upon which legislative and administrative measures discriminating against all classes of persons who do not enjoy that citizenship can with relative ease be enacted'.

The acquisition of citizenship of the United Kingdom and Colonies is dealt with first under the transitional rules and then the definitive rules which provide for acquisition of citizenship by birth; descent; registration; naturalisation; adoption; and incorporation of territory; and finally for a certificate of citizenship in case of doubt. Loss of citizenship of the United Kingdom and Colonies by deprivation or renunciation and a short chapter on the status of aliens conclude the work.

The changes of the law brought about by the Act of 1948 are well marked and Mr. Parry has sketched the background in each

case : perhaps the most important are the new rules that a married woman is for citizenship purposes now a *feme sole*; that for the same purposes persons legitimated *per subsequens matrimonium* are assimilated to those born in wedlock; and that a citizen of the United Kingdom does not lose British nationality by reason only of his naturalisation in a foreign country. There can be few predicaments of British nationality which Mr. Parry, in his careful comments and ingenious illustrations, has not compassed or imagined, and this work will be of great use to lawyers and administrators. Every British Consulate-General should have it.

*La Communauté Internationale et ses Institutions.* By M. Bibié. [Paris : Recueil Sirey. 1949. 248 pp. Fr. 480.]

Professor Bibié has sought to give a general survey of the evolution of those existing international institutions which he regards as most significant in the modern international community. Unfortunately he does not use the term community in a sociological sense, but rather as synonymous with society, with the result that he places the Catholic Church, customs unions and federations all on the same level.

His thesis depends on the concept that international unions are the first rudimentary gropings towards the organisation of international society. It is, he says, characteristic of international associations that they should be the result of free will, pursue non-lucrative ends, possess a certain stability and an international character. In these fundamentals they differ from the international community, for this lacks unity, is subject to contractual rules and is disorganised. Professor Bibié feels that these unions are the product of the internationalism that was rife during the latter half of the nineteenth century, and he points out that no less than fifty existed by the outbreak of the first world war, most of them possessing administrative functions in a specialised field.

In less that 140 pages Professor Bibié discusses the Permanent Court of Arbitration, the League of Nations, the I.L.O.—he points out that by 1949 the I.L.O. had adopted 80 Conventions and 80 Recommendations, of which Great Britain had only ratified 36 and France 48—the Permanent Court, the United Nations and the International Court, and regional arrangements. The chapter on regional arrangements is one of the longest in the book, and in it are to be found thumbnail sketches of the Pan-American Union from the Monroe Doctrine to the Organisation of American States; the Council of Europe—although this is only a talking shop the learned author considers it of outstanding importance in the

development of the international community, but it is submitted that his judgment is beclouded by idealism; and the North Atlantic Treaty Organisation—although this has been drawn up under Article 51 and Chapter VII of the Charter, and not under Article 53 and Chapter VIII.

The last 68 pages of *La Communauté Internationale* contain the texts of Hague Convention I, the League Covenant, the Constitution of the I.L.O., the Charter of the United Nations, the Universal Declaration of Human Rights—although there is only the barest reference *en passant* to the whole concept of human rights in the body of the work—the Statute of the International Court, the North Atlantic Pact, and the Statute of the Council of Europe. For those who want, therefore, an introductory survey to international institutions, the present work should prove useful.

L. C. Green.

*British Year Book of International Law, 1949.* [Oxford University Press. viii and 569 pp. 45s.]

The title page bears the following inscription: 'This volume of the British Year Book of International Law is dedicated to Sir Cecil James Barrington Hurst, G.C.M.G., K.C., LL.D., the Founder of the Year Book, upon the occasion of his eightieth birthday in grateful appreciation of his services to international law'; and in its scholarship, broad sweep and practical view, it is indeed a volume not unworthy of its dedication.

Public international law is represented by articles on Aspects of State Sovereignty (Judge McNair); Effectiveness in the Interpretation of Treaties (Professor Lauterpacht); Treaty-making power of the United Nations (Parry); Money in Public International Law (Mann); The Geneva Conventions, 1949 (Miss Gutteridge). International organisation is considered in an article by Professor Margaret Ball on the Organisation of American States and the Council of Europe and in Mr. Parry's comments on the constitutions of the World Meteorological Organisation and the Council of Europe. In the field of private international law Professor Graveson writes on the domicile of a widow in the English conflict of laws; and there is an article on the application of the maxim mobilia sequuntur to bankruptcy (Raeburn). Dr. Mervyn Jones also studies claims on behalf of nationals who are shareholders in foreign companies. The decisions of the English courts in 1948–1949 involving points of international law are reviewed in detail by Dr. Lipstein and Mr. Jennings.

Sir Eric Beckett contributes a preface on Sir Cecil Hurst's great services to the *Year Book* and to international law.

*Year Book of World Affairs, 1951.* Published under the auspices of the London Institute of World Affairs. [London: Stevens & Sons, Ltd. ix and 428 pp. 30s.]

There is much of international legal interest in this volume; particularly Mr. Johnson's study of the U.N. trusteeship system; Mr. Honig's article on the trial of crimes against humanity in the German courts and Miss Gutteridge's on the protection of civilians in occupied territory. The report on current legal aspects of world affairs is in fact a review not only of books and periodicals but of the activities of the various bodies working in the field of international law, and in this sense is unique; it is an excellent guide to current movements.

*Strengthening the Framework of Peace.* A study of current proposals for amending, developing, or replacing present international institutions for the maintenance of peace. By Alan de Rusett. [Oxford University Press. xiii and 225 pp. 21s.]

In 1931 Dr. A. C. F. Beales pointed out that there had not been any new ideas in the Peace Movement since the days of William Ladd and Henry Richard. 'I am sure this remains true today', says Mr. Alan de Rusett in the introduction to his *Strengthening the Framework of Peace.* There may be no new ideas, but those attempting to find a way through the labyrinth of proposed international organisations for a better maintenance of peace and security than the present world institutions for international co-operation provide, will be grateful for Mr. de Rusett's book.

The author is concerned with projects involving alteration or addition to existing institutions. Thus he examines Lord Cecil's proposals for a treaty of collective self-defence under the United Nations Charter but ignores the 'preventive war' school and the case put forward by Americans such as Mr. James Burnham. Mr. de Rusett has no place for pacifists and for the opposite of the 'preventive war-school', the fellow-travellers who exploit the existing institutions in favour of the Soviet Union.

Of the considerable number of peace plans put forward by the various countries that remain, Mr. de Rusett only treats those which have secured strong support. In his well-ordered chapters dealing with proposals within the structure of the United Nations and for an international force he gives a complete survey of the principal British and American suggestions. He examines the functional approaches to world organisation of Professor David Mitrany and Lord Boyd Orr. He compares the proposals for a world federal government and those for the unification of Europe.

He succeeds in presenting these major proposals clearly and

explains the principles and the lines of argument which gave birth to them. He draws attention more to the points of agreement between them than to the differences between the various schools and organisations.

The result is a valuable concise book of reference for the student or the plain man who may be bewildered by the many conventions, federal unions and drafts for federal pacts and world constitutions.

A short survey of sources will be useful to the unassisted wanderer in the realm of ' Grand Designs ', practical and Utopian.

P. M. Smedts

# LIST OF DOCUMENTS

## GENERAL ASSEMBLY RESOLUTION A/1481 NOVEMBER 3, 1950

### Resolution A

*The General Assembly,*

*Recognising* that the first two stated purposes of the United Nations are:

> 'To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace', and
>
> 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace',

*Reaffirming* that it remains the primary duty of all Members of the United Nations, when involved in an international dispute, to seek settlement of such a dispute by peaceful means through the procedures laid down in Chapter VI of the Charter, and recalling the successful achievements of the United Nations in this regard on a number of previous occasions,

*Finding* that international tension exists on a dangerous scale,

*Recalling* its resolution 290 (IV) entitled 'Essentials of Peace', which states that disregard of the principles of the Charter of the United Nations is primarily responsible for the continuance of international tension, and desiring to contribute further to the objectives of that resolution,

*Reaffirming* the importance of the exercise by the Security Council of its primary responsibility for the maintenance of international peace and security, and the duty of the permanent members to seek unanimity and to exercise restraint in the use of the veto,

*Reaffirming* that the initiative in negotiating the agreements for armed forces provided for in Article 43 of the Charter belongs to the Security Council, and desiring to ensure that, pending the conclusion of such agreements, the United Nations has at its disposal means for maintaining international peace and security,

*Conscious* that failure of the Security Council to discharge its responsibilities on behalf of all the Member States, particularly those responsibilities referred to in the two preceding paragraphs, does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security,

*Recognising* in particular that such failure does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security,

*Recognising* that discharge by the General Assembly of its responsibilities in these respects calls for possibilities of observation which would ascertain the facts and expose aggressors; for the existence of armed forces which could be used collectively; and for the possibility of timely recommendation by the General Assembly to Members of the United Nations for collective action which, to be effective, should be prompt,

A

*Assembly Action if Security Council Powerless Because of Veto*
*Special Emergency Session of Assembly*

1. *Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations;

2. *Adopts* for this purpose the amendments to its rules of procedure set forth in the annex to the present resolution;

B

*Peace Observation Commission*

3. *Establishes* a Peace Observation Commission which for the calendar years 1951 and 1952, shall be composed of fourteen members, namely: China, Colombia, Czechoslovakia, France, India, Iraq, Israel, New Zealand, Pakistan, Sweden, the Union of Soviet Socialist Republics, the United Kingdom of Great

Britain and Northern Ireland, the United States of America and Uruguay, and which could observe and report on the situation in any area where there exists international tension the continuance of which is likely to endanger the maintenance of international peace and security. Upon the invitation or with the consent of the State into whose territory the Commission would go, the General Assembly, or the Interim Committee when the Assembly is not in session, may utilise the Commission if the Security Council is not exercising the functions assigned to it by the Charter with respect to the matter in question. Decisions to utilise the Commission shall be made on the affirmative vote of two-thirds of the members present and voting. The Security Council may also utilise the Commission in accordance with its authority under the Charter;

4. *The Commission shall have* authority in its discretion to appoint sub-commissions and to utilise the service of observers to assist it in the performance of its functions;

5. *Recommends* to all governments and authorities that they co-operate with the Commission and assist it in the performance of its functions;

6. *Requests* the Secretary-General to provide the necessary staff and facilities, utilising, where directed by the Commission, the United Nations panel of field observers envisaged in General Assembly resolution 297 B (IV);

C

7. *Invites* each Member of the United Nations to survey its resources in order to determine the nature and scope of the assistance it may be in a position to render in support of any recommendations of the Security Council or of the General Assembly for the restoration of international peace and security;

*Special Units for Service with United Nations to be Maintained by Member Countries within National Armed Forces*

8. *Recommends* to the States Members of the United Nations that each member maintain within its national armed forces elements so trained, organised and equipped that they could promptly be made available, in accordance with its constitutional processes, for service as a United Nations unit or units, upon recommendation by the Security Council or General Assembly, without prejudice to the use of such elements in exercise of the right of individual or collective self-defence recognised in Article 51 of the Charter;

9. *Invites* the Members of the United Nations to inform the Collective Measures Committee provided for in paragraph 11 as soon as possible of the measures taken in implementation of the preceding paragraph;

*Military Experts Panel*

10. *Requests* the Secretary-General to appoint, with the approval of the Committee provided for in paragraph 11, a panel of military experts who could be made available, on request, to Member States wishing to obtain technical advice regarding the organisation, training, and equipment for prompt service as United Nations units of the elements referred to in paragraph 8;

D

*Collective Measures Committee*

11. *Establishes* a Collective Measures Committee consisting of fourteen members, namely: Australia, Belgium, Brazil, Burma, Canada, Egypt, France, Mexico, Philippines, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Venezuela and Yugoslavia, and directs the Committee in consultation with the Secretary-General and with such Member States as the Committee finds appropriate, to study and make a report to the Security Council and the General Assembly, not later that September 1, 1951, on methods, including those in Section C of the present resolution, which might be used to maintain and strengthen international peace and security in accordance with the purposes and principles of the Charter, taking account of collective self-defence and regional arrangements (Articles 51 and 52 of the Charter);

12. *Recommends* to all Member States that they co-operate with the Committee and assist it in the performance of its functions;

13. *Requests* the Secretary-General to furnish the staff and facilities necessary for the effective accomplishment of the purposes set forth in Sections C and D of the present resolution;

E

*Peace Depends on Observance of all Principles of the Charter Human Rights and Economic Well-being*

14. *The General Assembly*, in adopting the proposals set forth above, is fully conscious that enduring peace will not be secured solely by collective security arrangements against breaches of international peace and acts of aggression, but that a genuine and lasting peace depends also upon the observance of all the principles and purposes established in the Charter of the United Nations, upon the implementation of the resolutions of the Security Council, the General Assembly and other principal organs of the United Nations intended to achieve the maintenance of international peace and security, and especially upon respect for and observance of human rights and fundamental freedoms for all and on the

establishment and maintenance of conditions of economic and social well-being in all countries; and accordingly

15. *Urges* Member States to respect fully, and to intensify, joint action in co-operation with the United Nations, to develop and stimulate universal respect for and observance of human rights and fundamental freedoms, and to intensify individual and collective efforts to achieve conditions of economic stability and social progress, particularly through the development of under-developed countries and areas.

### Resolution B

For the purpose of maintaining international peace and security, in accordance with the Charter of the United Nations, and, in particular, with Chapters V, VI and VII of the Charter,

*The General Assembly*

*Recommends* to the Security Council :

That it should take the necessary steps to ensure that the action provided for under the Charter is taken with respect to threats to the peace, breaches of the peace or acts of aggression and with respect to the peaceful settlement of disputes or situations likely to endanger the maintenance of international peace and security;

That it should devise measures for the earliest application of Articles 43, 45, 46 and 47 of the Charter of the United Nations regarding the placing of armed forces at the disposal of the Security Council by the States Members of the United Nations and the effective functioning of the Military Staff Committee.

The above dispositions should in no manner prevent the General Assembly from fulfilling its functions under resolution (V).

### Resolution C

*The General Assembly,*

*Recognising* that the primary function of the United Nations Organisation is to maintain and promote peace security and justice among all nations,

*Recognising* the responsibility of all Member States to promote the cause of international peace in accordance with their obligations as provided in the Charter,

*Recognising* that the Charter charges the Security Council with the primary responsibility for maintaining international peace and security,

*Reaffirming* the importance of unanimity among the permanent members of the Security Council on all problems which are likely to threaten world peace,

*Recalling* General Assembly resolution 190 (III) entitled ' Appeal to the Great Powers to renew their efforts to compose their differences and establish a lasting peace ',

*Recommends* to the permanent members of the Security Council that :

(a) They meet and discuss, collectively or otherwise, and, if necessary, with other States concerned, all problems which are likely to threaten international peace and hamper the activities of the United Nations, with a view to their resolving fundamental differences and reaching agreement in accordance with the spirit and letter of the Charter;

(b) They advise the General Assembly and, when it is not in session, the Members of the United Nations, as soon as appropriate, of the results of their consultations.

One other resolution upon the maintenance of peace is to be noted (A/1529 of November 17, 1950). The first part, based upon a draft submitted by Yugoslavia, is printed below. The second part referred a proposed definition of aggression, submitted by the Soviet Union, to the International Law Commission for study and early report. This definition follows very closely that evolved at the Disarmament Conference, 1933, and embodied soon after in certain treaties between the Soviet Union and limitrophe States; but the present definition significantly omits ' aid to armed bands ' which had a place in the earlier definition.

DUTIES OF STATES IN THE EVENT OF THE OUTBREAK OF HOSTILITIES

(General Assembly Resolution A/1529 of November 17, 1950)

*The General Assembly,*

*Reaffirming* the principles embodied in the Charter, which require that the force of arms shall not be resorted to except in the common interest, and shall not be used against the territorial integrity or political independence of any State,

*Desiring* to create a further obstacle to the outbreak of war even after hostilities have started, and to facilitate the cessation of the hostilities by the action of the parties themselves, thus contributing to the peaceful settlement of disputes,

1. *Recommends*,

(a) That if a State becomes engaged in armed conflict with another State or States, it take all steps practicable in the circumstances and compatible with the right of self-defence to bring the armed conflict to an end at the earliest possible moment;

(b) In particular, that such State shall immediately, and in any case not later than twenty-four hours after the outbreak of the hostilities, make a public statement wherein it will proclaim its readiness, provided that the States with which it is in conflict will do the same, to discontinue all military operations and withdraw all its military forces which have invaded the territory or territorial waters of another State or crossed a demarcation line, either on terms agreed by the parties to the conflict or under conditions to

be indicated to the parties by the appropriate organs of the United Nations;

(c) That such State immediately notify the Secretary-General, for communication to the Security Council and to the Members of the United Nations, of the statement made in accordance with the preceding sub-paragraph and of the circumstances in which the conflict has arisen;

(d) That such State, in its notification to the Secretary-General, invite the appropriate organs of the United Nations to dispatch the Peace Observation Commission to the area in which the conflict has arisen, if the Commission is not already functioning there;

(e) That the conduct of the States concerned in relation to the matters covered by the foregoing recommendations be taken into account in any determination of responsibility for the breach of the peace or act of aggression in the case under consideration and in all other relevant proceedings before the appropriate organs of the United Nations;

2. *Determines* that the provisions of the present resolution in no way impair the rights and obligations of States under the Charter of the United Nations nor the decisions or recommendations of the Security Council, the General Assembly, or any other competent organ of the United Nations.

## SPEECH BY RIGHT HON. SIR FRANK SOSKICE, K.C., M.P., IN THE FIRST COMMITTEE ON THE UNITED ACTION FOR PEACE RESOLUTION (OCTOBER 16, 1950)

MR. CHAIRMAN:

When Mr. Kenneth Younger, head of the United Kingdom delegation, addressed the Committee he made it clear in the course of his speech that it was the view of the United Kingdom delegation that the procedure envisaged in paragraph A of the resolution was entirely in accord with the text of the Charter. He stated in general terms that this was the view of the United Kingdom delegation, but he also added that it was the intention of the United Kingdom delegation, when the individual sub-headings of the resolution came up for discussion pursuant to your ruling, Mr. Chairman, to reply in somewhat more detail to the arguments advanced by some members of the Committee, particularly by the distinguished delegate of Pakistan, expressing doubts which had occurred to them as to the legality of the proposals contained in the United States resolution. I venture to ask your permission to address the Committee solely for the purpose of implementing what Mr. Kenneth Younger said, and would like to repeat at the outset as Mr. Younger made plain, that the United Kingdom delegation attach greatest importance to the question whether or not we are in fact strictly within the terms of the Charter.

We in the United Kingdom, I believe, are sometimes thought to be unduly rigid in our observance of the strict letter of the law and it has been our endeavour, in considering and helping to formulate the resolution of which we are co-sponsors, to make certain that in no sense could it be said that the Charter was being transgressed. We feel the very greatest respect for the doubts and hesitations which have actuated some members of the Committee, and it is only because after very careful cogitation on these matters we are, as a delegation, convinced that the American proposals are justified by the letter of the Charter, that we have felt able to lend our whole-hearted support to the proposals.

In venturing to address the Committee I do so in the hope that I may be able, to some extent at any rate, to ease the difficulties which have caused, for example, the Pakistan delegation to hesitate as to whether they should lend the resolution their support. A very general and ardent desire has, throughout the course of our debate on the resolution, manifested itself in the Committee that the object of the resolution should be achieved, but it would indeed be unfortunate if we could only achieve this object by doing violence to the letter of the law since, after all, it is our common wish and endeavour to establish, as a supreme arbiter of the destinies of nations, a code of international law which should govern all their actions.

I will accordingly endeavour to reply to the arguments that have been advanced, confining myself to an analysis of the text of the Charter for this purpose.

As Mr. Dulles has pointed out, Article 10 confers upon the General Assembly the function of considering, with a view to making recommendations, any matters within the scope of the Charter subject to certain limitations. One begins therefore with the situation that the General Assembly may take into its consideration and make recommendations upon any matter within the scope of the Charter unless one can find, in some other provision of the succeeding Articles, some wording which imposes a limitation operative in any particular case to prevent the General Assembly from taking any subject into consideration. There can, of course, be no doubt whatsoever that situations which may give rise or have given rise to international friction or to a breach of the peace are matters which fall within the scope of the Charter, and that prima facie therefore Article 10 of the Charter enables the General Assembly to make recommendations with regard to them.

So far, therefore, the position is that the General Assembly is empowered to discuss it and make recommendations upon it unless some provision can be found in some other Article of the Charter which prevents this.

There are, so far as appear to the United Kingdom delegation, really only two Articles of the Charter which could be said to imply a limitation. These are Article 11, sub-paragraph 2, and Article 12, sub-paragraph 1, and it is material to consider, in these circumstances whether either of these Articles are, when their actual text is considered, so worded as to prevent the General Assembly from embarking upon consideration of these subjects.

I am, Mr. Chairman, designedly refraining from mentioning the general purport and object of the Charter as the views of the United Kingdom delegation on these topics have already clearly been made known by Mr. Kenneth Younger in the speech which he addressed to our Committee in the earlier course of our debate. For the purpose of my argument, I am treating it as wholly immaterial whether or not the situation centring upon the abuse by Soviet Russia and the Slav Powers of the veto was, or was not, within the contemplation of those who framed the Charter. Whether it was or not, the question which I am endeavouring to deal with can be stated as follows: whatever may have been their intention, have the words which the framers of the Charter in fact used to embody that intention conferred the necessary powers upon the General Assembly to implement the terms of the resolution proposed to our Committee?

For this purpose, then, I proceed from the initial position that Article 10 confers upon the General Assembly a general authority to make recommendations with regard to the kind of situations which we have in mind to consider whether Articles 11 and 12 limit and cut down this general authority in such a way as to render such a proceeding unlawful under the terms of the Charter.

The material sentence in Article 11 is the last sentence of sub-paragraph 2. As the Committee will remember, this sentence provides, if I may quote it, 'That any question on which action is necessary shall be referred to the Security Council by the General Assembly, either before or after discussion'. If one reads these words in their ordinary sense what is the limitation which they impose?

If one assumes that a given situation has arisen in which a threat to the peace of the world is apparent, or an actual breach of the peace has been committed, it would no doubt in the general sense seem that that is a situation which posits the taking of some action, however one may interpret the word 'action', and that, accordingly, within the meaning of this sentence 'the question is one on which action is necessary'. If we assume that this is the case, what is it that the sentence requires? It requires surely, simply and solely this: that such a question should, by the appropriate procedural machinery, either before or after discussion by the General Assembly, be referred, that is to say, brought to the cognisance of and submitted to the Security Council for its

consideration with a view, if necessary, to exercising the powers conferred upon it by Chapters 5, 6 and 7 of the Charter. Article 24 of the Charter provides that it is to be the primary responsibility, I repeat, the primary and not sole responsibility, of the Security Council to provide for the maintenance of international peace and security. In conformity with this it is not to be wondered at that the Charter contains the appropriate provisions in Article 11, to enable the Council to be seised of the matter with a view to exercising in relation to it the powers which it has.

We, therefore, and I believe all our co-sponsors too, as indeed they have made clear in the course of this debate, envisage that if such a question does arise on which action is necessary, it shall undoubtedly be referred by the General Assembly to the Security Council. It must, once it has become apparent that action is necessary, be by the appropriate procedural machinery brought to the cognisance of the Security Council, which accordingly must have the opportunity of deciding what is to be done in relation to it.

The United Kingdom delegation is however of the very clear opinion that if this procedure is adopted, and the Security Council does not exercise in relation to it the powers which it can exercise, the General Assembly is in no possible sense prohibited by anything provided in Article 11 from exercising those general functions in relation to such a situation which Article 10 confers upon the General Assembly. This seems to the United Kingdom delegation to be the plain effect of the words used, and even if the words did not clearly mean this, to be obviously in conformity with what the Charter intends.

Mr. Kenneth Younger, in his speech, invited the Committee to take the view that we should, as far as possible, construe the Charter as to prevent it appearing to be wholly ineffective for the purpose for which it was designed. Sometimes jurists, in their very natural desire to prevent the law from appearing in so unfortunate a light, are inclined to do violence to its terms. It is the view of the United Kingdom delegation that, basing ourselves strictly upon the letter of the Charter, we can prevent the law from being frustrated because the plain letter of the law confers upon the General Assembly the powers necessary to avoid that result; namely, those very powers which in the terms of the present resolution we are, as Mr. Younger said, clarifying and formulating for that purpose. We therefore envisage that a given situation having arisen which has been brought to the notice of the General Assembly, it shall be referred, strictly in accord with Article 11, to the Security Council. If the Security Council then, owing, in particular, to the exercise of the veto, finds that it cannot deal with the situation, the matter has plainly under the terms of the Charter, the relevant provisions of which are brought together in the resolution which we are proposing, come again within the competence of

the General Assembly. It has been referred to the Security Council and that having produced no result and the question being once again off the agenda of the Security Council it is, in the view of the United Kingdom delegation, not only within the competence of the General Assembly to deal with it, but it is the plain and obvious duty of the General Assembly to exercise the functions conferred upon it by Article 10 of the Charter.

So far, if I have carried the Committee with me, there is plainly no obstacle in the way of what is proposed by our resolution. What, then, is the other suggested obstacle? It is that which appears under Article 12. If, however, the matter has been referred to the Security Council and the Security Council has by its own vote removed it from the list of items on its agenda so that it is once again at large and not subject to the consideration of the Security Council, it is, in the view of the United Kingdom delegation, at any rate, transparently clear that consistently with Article 12 the General Assembly may make recommendations.

Article 12, as the Committee knows well, provides that the General Assembly shall not make recommendations with regard to any dispute or situation while the Security Council (and I quote) 'is exercising in respect of any dispute or situation the functions assigned to it under the present Charter'. If the Security Council, by a deliberate vote of its own members, resolves that a question is to be taken off its agenda, how can it be said, after the question has been so taken off, to be exercising any function in relation to that question assigned to the Security Council under the present Charter? What function is it exercising and in what Article do we find the function laid down? It cannot be a function assigned to the Security Council under the Charter, to do nothing. It is not exercising a function when it is doing nothing at all. The General Assembly, consistently with Article 12, in the view of the United Kingdom delegation, once the question has been removed from the agenda of the Security Council, not only has the right but is under the plain duty of exercising in relation to it the powers conferred upon the General Assembly by the Charter. What are those? The powers are powers to make recommendations.

The United Kingdom delegation does not suggest that the Charter anywhere confers upon the General Assembly the power to take action. It cannot decree enforcement action, as it is called. Its powers are limited to making recommendations but, as has been pointed out, although this is a matter not of law but of practical experience, a recommendation of the General Assembly in fact carries great force with it, in exactly the same way as in the case of Korea did the recommendation made by the Security Council under Article 39.

If a recommendation is made by the General Assembly involving some positive action on the part of a member State, it is perfectly

lawful for the member States to exercise the powers which international law already confers upon them, and those rights, as Mr. Younger said quite clearly, as an accepted principle of international law, include the right both to defend themselves and, if called upon to do so, their friends also, in the face of unjustified aggression by some other power. They could, under accepted principles of international law, even if there had been no Charter, exercise such rights which are vested in each and every nation of the world family of nations. The Charter does not cut down these rights, except that Article 51 provides that when the Security Council comes upon the scene nations must obey its dictates. If, however, the General Assembly, acting within its powers, makes a recommendation that nations should exercise the individual or collective right of self-defence which international law has vested in them and they, in response to that recommendation, exercise those rights, by no conceivable stretch of the imagination, in the view of the United Kingdom delegation at any rate, can it be said that the least illegality has occurred or the least transgression against the literal word of the Charter.

Mr. Chairman, I have confined myself to those observations which seemed to the United Kingdom delegation relevant with regard to paragraph A of the Resolution. This is the paragraph which refers to the making of recommendations by the General Assembly. Some members of our Committee felt doubts as to whether it was permissible in conformity with the terms of the Charter for the General Assembly to make such recommendations more particularly if the recommendations involved the use of force for the purpose of collective self-defence by nations affected by the recommendations. If the arguments I have outlined are well founded, I would submit to the Committee that at any rate it is competent to the General Assembly to make those recommendations. There are, of course, other questions of law to which reference was made by various members of our Committee affecting more particularly the remaining paragraphs of the Resolution. As, in accordance with your ruling, these paragraphs are to be discussed separately, the United Kingdom delegation would desire to reserve its further comments until those paragraphs are reached and to limit their submissions, as I have limited them, strictly to the first consideration whether the Assembly can lawfully make recommendations in circumstances envisaged in paragraph A of the Resolution. This question is, of course, crucial and gave rise, I think, to the major doubts felt by those members of our Committee who devoted particular consideration to the aspect of legality.

I hope that those members of our Committee may feel that there is substance in the arguments which I have endeavoured to deploy and that the view of the United Kingdom, that nothing in the wording of the Charter is in any way contravened by the provisions of paragraph A of the Resolution, is well founded.

## I. Agreements and Other Documents

Agreement between the Governments of the United Kingdom and India and the Government of Siam for the Termination of the State of War. [Treaty Series 1951/10, January 1, 1946, Cmd. 8140.]

International Convention on Telecommunications.[1] [Treaty Series 1950/76, October 2, 1947, Cmd. 8124.]

Constitution of the International Rice Commission.[2] [Treaty Series 1950/76, November 3, 1948, Cmd. 8118.]

Protocol amending the Agreement of May 4, 1910, for the Suppression of the Circulation of Obscene Publications. [Treaty Series 1951/13, May 4, 1941, Cmd. 8152.]

Exchange of Notes between the Government of the United Kingdom and the Federal Government of Austria regarding Financial Aid and Credits to Austria. [Treaty Series 1950/177, April 5, 1950–May 15, 1950, Cmd. 8122.]

Agreement between the United Kingdom Government and the Government of Iceland relating to Certain Air Transport Services. [Treaty Series 1951/5, May 20, 1950, Cmd. 8135.]

Agreement between the United Kingdom Government and the Government of the United States of America for the Establishment in the Bahama Islands of a Long Range Proving Ground for Guided Missiles. [Treaty Series 1950/74, July 21, 1950, Cmd. 8109.]

Loan Agreements between the United Kingdom Government and the Export-Import Bank of Washington. [Treaty Series 1950/78, October 26, 1948—September 20, 1950, Cmd. 8126.]

Monetary Agreement between the United Kingdom Government and the Danish Government. [Treaty Series 1950/72, October 19, 1950, Cmd. 8104.]

Exchange of Notes between the United Kingdom Government and the Government of the United States of America terminating the Air Navigation Agreement of March 28—April 5, 1935. [Treaty Series 1951/8, September 29—October 23, 1950, Cmd. 8137.]

Monetary Agreement between the United Kingdom Government and the Norwegian Government. [Treaty Series 1950/70, November 6, 1950, Cmd. 8095.]

Monetary Agreement between the United Kingdom Government and the Swedish Government. [Treaty Series 1950/73, November 10, 1950, Cmd. 8105.]

Exchange of Notes between the United Kingdom Government and the Swiss Government modifying the Monetary Agreement of March 12, 1946. [Treaty Series 1951/3, November 10, 1950, Cmd. 8129.]

[1] Accepted by the Government of the United Kingdom on February 28, 1949.
[2] Ratified by the Government of the United Kingdom on November 29, 1949.

Exchange of Notes between the United Kingdom Government and the Portuguese Government further modifying the Monetary Agreement of April 16, 1946. [Treaty Series 1951/1, November 30—December 11, 1950, Cmd. 8127.]

Sterling Payments Agreement between the United Kingdom Government and the Italian Government. [Treaty Series 1951/4, December 21, 1950, Cmd. 8132.]

Monetary Agreement between the United Kingdom Government and the Government of Belgium and Luxembourg. [Treaty Series 1951/6, December 30, 1950, Cmd. 8136.]

Exchange of Notes between the United Kingdom Government and the Government of Thailand regarding the Settlement of Outstanding War Claims against Thailand. [Treaty Series 1951/16, May 4 and November 8, 1950, and January 3, 1951, Cmd. 8163.]

## II. Statutory Instruments

The Exchange Control (Specified Currency) Order, 1950. [No. 1933, December 1.]

The Exchange Control (Prescribed Securities) Order, 1950. [No. 1934, December 1.]

The Exchange Control (Payments) (Denmark, the Faroe Islands and Greenland) Order, 1950. [No. 1935, December 1.]

The Exchange Control (Payments) (Netherlands Monetary Area) Order, 1950. [No. 1936, December 1.]

The Aliens (Landing Conditions) Instrument, 1950. [No. 1963, December 8.]

The Trucial States Order in Council, 1950. [No. 1967, December 8.]

The Eastern African Court of Appeal Order in Council, 1950. [No. 1968, December 8.]

The Carriage by Air (Parties to Convention) Order, 1950. [No. 1970, December 8.]

The Double Taxation Relief (Taxes on Income) (Brunei) Order, 1950. [No. 1977, December 8.]

The Double Taxation Relief (Taxes on Income) (Ceylon) Order, 1950. [No. 1978, December 8.]

The Foreign Compensation Commission Rules Approval Instrument, 1950. [No. 2042, December 15.]

The Gold Coast (Constitution) Order in Council, 1950. [No. 2094, December 21.]

The Northern Territories of the Gold Coast Order in Council, 1950. [No. 2095, December 21.]

The Togoland under United Kingdom Trusteeship (Amendment) Order in Council, 1950. [No. 2096, December 21.]

The Colonial Probates Act (Application to New Brunswick) Order, 1950. [No. 2097, December 21.]

The Singapore Colony (Amendment) Order in Council, 1950. [No. 2099, December 21.]

The Falkland Islands (Continental Shelf) Order in Council, 1950. [No. 2100, December 21.]

The Exchange Control (Payments) (Greece) Order, 1951. [No. 64, January 16.]

The Exchange Control (Payments) (Austria) Order, 1951. [No. 65, January 16.]

## III. United Nations Documents

A. *International Law Commission*

Report of the International Law Commission covering its Second Session, June 5—July 29, 1950. [Supplement No. 12 (A/1316).]

Memorandum on Arbitral Procedure. [A/CN.4/35, November 21, 1950.]

Memorandum on the Soviet Doctrine and Practice with respect to the Law of Treaties. [A/CN.4/37, November 21, 1950.]

B. *General Assembly, First Committee*

Duties of States in the Event of the Outbreak of Hostilities—Report of the First Committee. [A/1500, November 13, 1950.]

## CORRESPONDENCE

Sir:

In Mr. Fischer's article, 'The Suppression of Slavery', which appeared in your January number, he says (p. 43): 'It is to the credit of the Northern States of the U.S.A. (or some of them, *e.g.*, Massachusetts) that they eliminated slavery in their own territories before it was done in Europe or in European colonies'.

Mr. Fischer does not refer to just when this was done, I assume it was by legislation, but I am led to ask whether the legislation antedated that passed in Denmark in 1792 and in the Province of Upper Canada (now Ontario) in 1793?

The Province of Upper Canada was created in 1791 and at the second session of its first Parliament, held at Newark (now Niagara) in May, 1793, there was enacted—33 Geo. 3, c. 7 (U.C.)—'An Act to prevent the further introduction of slaves and to limit the terms of contracts for service within the Province'.

As the late Mr. Justice Riddell wrote in (1913) 33 Canadian Law Times 96, at 105: 'It (the Act) practically abolished slavery in the Province (and) repealed for Upper Canada, 30 Geo. 3, c. 27 (Imp.) authorising the importation of slaves into a colony. All negroes then slaves continued to be slaves, children of female slaves born after the Act served the master until the age of twenty-five years and then became free'.

The Act which made all newcomers into the Province free was not universally popular but an attempt made in 1796 to pass a 'Bill to enable persons migrating into this Province to bring their negro slaves into the same' failed and the matter was never revived.

It may be of interest to note that John Baker, the last of all who had been slaves in Canada, after serving in the regiment of New Brunswick during the war of 1812, and later fighting in the Battle of Waterloo, died at Cornwall, Ontario, in 1871 aged about 98. To which I might add that Delos R. Davis, K.C., the first coloured man admitted to the Bar of Ontario, died at Amherstburg, Ontario, in 1915.

Mr. Justice Riddell, one of our ablest Canadian judges and an historian of note, as well known in the United States as in Canada, has dealt with this interesting subject in his book, *The Slave in Canada*, published in Washington in 1920.

May I say with what interest I have studied Mr. Fischer's article and how much I am looking forward to the concluding instalment.

Yours sincerely,

E. K. Williams,
Chief Justice of the Court of
King's Bench for Manitoba